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**IMPROPER DISTINCTION UNDER THE ADA LEADS TO AN  
IRRATIONAL OUTCOME:  
FAVORING ONE LIFE OVER ANOTHER**

*Daniel Frederick Parise\**

**ABSTRACT**

Society has a distorted view of those battling addiction and essentially marks them with a sign of disgrace; however, what society may not fully understand is that addiction is a disability beyond the afflicted individual's control. The National Survey on Drug Use and Health indicates that 19.7 million Americans have battled a substance use disorder in their life. Of the 19.7 million Americans who battled illicit substance use disorders, approximately seventy-four percent also struggled with alcohol use disorder.

Based on these statistics, it is clear that illicit drug use disorders are often interconnected with alcohol use disorders. However, Congress makes a distinction between substances that are legal or illegal when determining if individuals are protected under the A.D.A. Thus, current illicit substance users will not be afforded protection. Granted, the state's legitimate purpose is to deter individuals from engaging in the use of illegal substances. However, modern studies have shown that people's addictions become biochemical in nature and may be exacerbated as a result of their genetic composition. At this point, these individuals are not consciously choosing to violate the law; instead, they are driven by the chemical imbalance in their brain and being punished for it. Ultimately, the current structure of the A.D.A. inherently discriminates against certain individuals based on their substance of choice, thereby favoring one person's life over another's

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simply because they chose an “acceptable” addiction. However, raising the level of scrutiny from rational basis review to intermediate scrutiny will prevent Congress from criminalizing diseases, such as substance use disorders.

## I. INTRODUCTION

Historically, alcohol was, and continues to be, viewed as a socially acceptable mind- and mood-altering substance. In fact, the first winery on record was established in Armenia around 7,000 B.C.<sup>1</sup> The ancient Greeks and Romans participated in festivals to praise the Greek god Dionysus, known as the god of wine.<sup>2</sup> Even today, individuals celebrate “Oktoberfest,” which is a holiday that celebrates the marriage between the crown prince of Bavaria and Princess Therese von Sachsen-Hildburghausen that took place in 1810—though, many people do not know this history and partake in the drinking celebration regardless.<sup>3</sup> Conversely, society condemns the use of illicit drugs naming it a source of conflict; thus, users are ultimately looked down upon.<sup>4</sup> This societal point of view fails to consider the similarities and differences between the short- and long-term effects of alcohol and illicit drugs.<sup>5</sup>

Initially, addiction was viewed as a moral failure, and people who suffered from addiction “were left to die in the street or were thrown in prison.”<sup>6</sup> It is possible that such individuals made one simple mistake that changed the course of their entire lives. Moreover, this mistake can permanently change the way people perceive them, regardless of whether those individuals are in active addiction or recovery.<sup>7</sup>

Society has a distorted view towards those battling addiction and essentially marks them with a sign of disgrace; however, what society may not fully understand is that addiction is a disability beyond

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<sup>1</sup> *The History and Statistics of Drug and Alcohol Addiction*, MISSION HARBOR BEHAV. HEALTH, <https://sbtreatment.com/addiction> (last visited Feb. 5, 2021).

<sup>2</sup> *Id.*; *Dionysus, GREEK GODS & GODDESSES*, <https://greekgodsandgoddesses.net/gods/dionysus> (last visited Feb 5, 2021).

<sup>3</sup> Adam Augustyn, *Oktoberfest: German Festival*, BRITANNICA, <https://www.britannica.com/topic/Oktoberfest> (last visited Sept. 1, 2020).

<sup>4</sup> Nora D. Volkow, *Fighting Back Against the Stigma of Addiction*, BEHAV. & SOC’Y (Sept. 1, 2020), <https://www.scientificamerican.com/article/fighting-back-against-the-stigma-of-addiction>.

<sup>5</sup> See discussion *infra* Section II.

<sup>6</sup> *The History and Statistics of Drug and Alcohol Addiction*, MISSION HARBOR BEHAV. HEALTH, <https://sbtreatment.com/addiction/> (last visited Feb. 5, 2021).

<sup>7</sup> See Nora D. Volkow, *Addressing the Stigma that Surrounds Addiction*, NAT’L INST. HEALTH, (Apr. 22, 2020), <https://www.drugabuse.gov/about-nida/noras-blog/2020/04/addressing-stigma-surrounds-addiction>.

the afflicted individual's control.<sup>8</sup> It is common for the general population to view individuals with an alcohol or substance use disorder through this lens.<sup>9</sup> Modern healthcare systems have the potential to help afflicted individuals through rehabilitative techniques, which can significantly decrease the number of deaths stemming from alcohol and substance use disorders.<sup>10</sup> However, the widely-held misconception that alcohol and substance use disorders are a result of moral weakness and poor character deters afflicted individuals from seeking the help they require.<sup>11</sup>

In 1990, Congress acknowledged that society tends to “isolate and segregate individuals with disabilities”<sup>12</sup> despite the fact that “physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society.”<sup>13</sup> Persistent discrimination against this class of individuals denies them the opportunity to pursue opportunities involving “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services.”<sup>14</sup> In response, Congress enacted the Americans with Disabilities Act (“A.D.A.”) which affords protection for individuals with mental or physical disabilities by providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>15</sup>

As of 2019, approximately sixty-one million Americans have one or more physical or mental disabilities.<sup>16</sup> Furthermore, the National Survey on Drug Use and Health indicates that 19.7 million

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<sup>8</sup> Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, 57 HARMONDSWORTH PENGUIN 1, 10 (1984) (explaining that Greek culture “originated the term stigma to refer to bodily signs designated to expose something unusual and bad about the moral status of the signifier”). See also discussion *infra* Section II.

<sup>9</sup> Volkow, *supra* note 4.

<sup>10</sup> Volkow, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> 42 U.S.C. § 12101(a)(3).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* § 12101(a)(8).

<sup>15</sup> *Id.* § 12101(b)(1).

<sup>16</sup> *Disability and Health Promotion: Disability Impacts All of Us*, CTR. DISEASE CONTROL, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> (last visited Sept. 18, 2020).

Americans have battled a substance use disorder in their life.<sup>17</sup> Of the 19.7 million Americans who battled illicit substance use disorders, approximately seventy-four percent also struggled with alcohol use disorder.<sup>18</sup> Based on these statistics, it is clear that illicit drug use disorders are often interconnected with alcohol use disorders; however, the current structure of the A.D.A. does not provide protections for any individual currently diagnosed with an illicit substance use disorder, nor does it account for any addiction overlap.

Congress makes a distinction between substances that are legal or illegal when determining if individuals are protected under the A.D.A., and there is no acknowledgment of the similar adverse effects individuals face when battling an illegal or legal substance use disorder.<sup>19</sup> Individuals “currently” struggling with *alcohol* use disorder may be eligible for protection because it is a recognized disability under the A.D.A.<sup>20</sup> On the other hand, the A.D.A. does not define individuals who “currently” struggle with an *illicit substance* use disorder as disabled.<sup>21</sup>

Granted, the ADA acknowledges the hardships faced by individuals with disabilities.<sup>22</sup> It also states that “the nation’s proper goals regarding individuals with disabilities are to assure equal opportunity . . . and economic self-sufficiency for such individuals.”<sup>23</sup> When applied, the current ADA laws result in punishing people who are battling disabilities, rather than helping them, based on a legality distinction.<sup>24</sup> This arbitrary distinction between legality and illegality, for purposes of ADA protection, is improper if the intent is to provide equal opportunities and eliminate discrimination against all individuals with disabilities.

This Note is divided into six sections. Section II examines the similarities between alcohol and illicit substance use disorders with respect to internal and external factors that have the power to influence

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<sup>17</sup> Scot Thomas, *Alcohol and Drug Abuse Statistics*, AM. ADDICTION CTRS., <https://americanaddictioncenters.org/rehab-guide/addiction-statistics> (last visited Feb. 1, 2021).

<sup>18</sup> *Id.*

<sup>19</sup> 42 U.S.C. § 12114.

<sup>20</sup> *Id.* § 12114(b) (emphasis added).

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *See generally id.* § 12101(a)(3) (discussing obstacles faced by individuals with disabilities).

<sup>23</sup> *Id.* § 12101(a)(7).

<sup>24</sup> *See generally id.* § 12114.

the course of the afflicted individual's life. Section III sets forth the standards of review employed by courts when examining the constitutionality of any proposed legislation. Section IV evaluates the detrimental effects of applying a rational basis review to issues involving the A.D.A. Section V argues that the A.D.A., as currently applied, is overinclusive and adversely affects law abiding citizens. Section V also notes that raising the level of scrutiny from rational basis review to intermediate scrutiny will prevent Congress from criminalizing a disease, such as substance use disorders. Section VI concludes by illuminating the inherent discrimination rooted in the A.D.A against individuals based on the substance to which they are addicted.

## II. SIMILARITIES BETWEEN ALCOHOL AND ILLICIT SUBSTANCES

### A. Nature Versus Nurture: Alcohol & Substance Use Disorders

There are several contributing factors that may cause an individual to use mind- or mood-altering substances, which include a poor family dynamic or traumatizing events in the afflicted individual's life.<sup>25</sup> However, understanding the impulsiveness behind such disorders is essential to properly treat the afflicted individuals.

A study, conducted by Stogner and Gibson, aimed to identify the reasons why some individuals are more susceptible to substance use compared to others.<sup>26</sup> The results indicate that the Monoamine Oxidase A ("MAO-A") gene has the potential to increase the likelihood of an individual's substance use—illicit or alcohol.<sup>27</sup> Recent studies and analyses "support the finding that the link between stressful experiences and negative behavioral and psychological outcomes is [the result of] a difference in human genetic variation[s]."<sup>28</sup> The MAO-A gene is located on the X chromosome and "is an enzyme responsible for degrading serotonin, norepinephrine

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<sup>25</sup> John M. Stogner & Chris L. Gibson, *Stressful Life Events and Adolescent Drug Use: Moderating Influences of the MAOA Gene*, 41 J. CRIM. JUST. 357, 358-59 (2013) (discussing the effects of low levels of the MAO-A gene).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 358.

and dopamine.”<sup>29</sup> As a result, low levels of MAO-A activity are linked to anti-social behavior, substance use, impulsive and sensation seeking behaviors.<sup>30</sup> The effects of low levels of MAO-A are most influential when the affected individual encounters negative environments and trauma.<sup>31</sup> The presence of the polymorphic MAO-A gene may explain why some people are more receptive to drug use than others.<sup>32</sup> Furthermore, Stogner and Gibson’s findings explain that substance use disorders have a genetic component, making them physical or mental disabilities, which may be beyond the individual’s control.<sup>33</sup> This genetic data indicates that illicit substance use can be the result of people’s nature—their pre-wired genetic inheritance. Thus, low levels of the MAO-A gene are *at least* partially responsible for the individual’s illicit substance use disorder, and the ADA should acknowledge such disabled individuals as a protected class—regardless of whether they are current users or in recovery.<sup>34</sup>

The family members of a person struggling with an alcohol use disorder are not immune from its negative effects, even though they are not the ones personally suffering from the disease. The afflicted individuals often fail to perform their duties as a parent and a partner which directly affects the household and everyone in it.<sup>35</sup> The familial impact of the habitual drinker’s actions may be further assessed through the effects imposed on individuals who have a spouse, partner, or parent struggling with an alcohol use disorder.<sup>36</sup> The World Health Organization found that, due to the strained familial relationships, such family members can face severe mental health issues such as anxiety, fear, and depression.<sup>37</sup>

Moreover, residing with a parent or guardian who has a substance use disorder can negatively impact children and their future

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* “Genetic polymorphism is defined as the inheritance of a trait controlled by a single genetic locus with two alleles, in which the least common allele has a frequency of about 1% or greater.” Somaia Ismail, *Genetic Polymorphism Studies in Humans*, MIDDLE E. J. MED. GENETICS, July 2012, at 1.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Geneva: World Health Organization, Global Status Report on Alcohol and Health 2018, at 11, U.N. Doc. CC BY-NC-SA 3.0 IGO (2018).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*



in a variety of ways. In fact, children who grow up in a home with a parent or guardian who suffers from a substance use disorder are *four times more likely* to develop substance use disorders of their own.<sup>38</sup> Additionally, children in this type of environment are three times more likely to be neglected or physically abused.<sup>39</sup> They may also develop emotional issues, such as anxiety and depression, because they feel unsafe around the afflicted individual.<sup>40</sup> It is at this point that we must recognize how illicit substance use disorders can result from a person's genetic composition and environment. More to the point, the law should provide a method that allows individuals currently struggling with a substance use disorder to receive the help they need and deserve; affording such individuals legal recourse to address their disability will help promote their life and the well-being of those around them. Without any legal recourse, a recurring cycle of substance use disorders within a family may persist. For instance, if a child born with low levels of MAO-A continuously experiences trauma due to a parent's or guardian's substance use disorder, such child has an increased likelihood of developing this disorder—whether it be substance use, depression, or anxiety. Then, once these children become adults and have children, it is likely that their children will suffer a similar fate.

Thus, alcohol and illicit substance use disorders can be the result of a person's living situation as a child and genetic configuration.<sup>41</sup> To break this cycle, the disparity in legal protections afforded to those afflicted by alcohol and substance use disorders must be addressed.

### **B. Alcohol and Substance Use Disorders: Effects on Brain Chemistry**

Individuals suffering from alcohol and illicit substance use disorders face a variety of consequences that affect their daily

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<sup>38</sup> Rachel N. Lipari, *Children Living with Parents Who Have a Substance Use Disorder*, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN. (Aug. 24, 2017), [https://www.samhsa.gov/data/sites/default/files/report\\_3223/ShortReport-3223.html](https://www.samhsa.gov/data/sites/default/files/report_3223/ShortReport-3223.html) (emphasis added).

<sup>39</sup> Krystina Murray, *The Many Ways Addiction Affects the Family*, ADDICTION CTR. (Dec. 2, 2020) <https://www.addictioncenter.com/addiction/how-addiction-affects-the-family>.

<sup>40</sup> *Id.*

<sup>41</sup> See *supra* notes 25-40 and accompanying text.

functions and the lives of those around them. These substances affect major areas in the brain that are “necessary for life sustaining functions,” such as eating and sleeping.<sup>42</sup> The basal ganglia, a portion of the brain that plays an essential role in promoting positive forms of motivation, may be over activated by consistent alcohol or substance use.<sup>43</sup> With repetitive exposure, the individual’s sensitivity to the substance decreases, which makes it hard to feel pleasure from anything besides the substance—alcohol or illicit.<sup>44</sup> The extended amygdala is a second portion of the brain affected by persistent alcohol and substance use, which governs feelings of “anxiety, irritability, and unease.”<sup>45</sup> Through repetitive substance use, the extended amygdala may become increasingly sensitive.<sup>46</sup> This, in turn, causes anxiety, irritability, and unease in the user, causing the individuals to seek the substance again.<sup>47</sup> A third portion of the brain, the prefrontal cortex, may become compromised by substance or alcohol abuse.<sup>48</sup> This is the part of the brain that drives the individual’s ability to think, plan, solve problems, make decisions, and exert self-control over impulses; therefore, damage to this area can result in reduced impulse control.<sup>49</sup>

Definitively, brain scans have shown numerous negative effects that alcohol and illicit substances had on the user’s brain, thus, proving that addiction is a disease that may be treated and controlled.<sup>50</sup> Medical professionals have established that these afflictions are complex brain disorders with numerous behavioral components; yet, individuals struggling with these disorders are still blamed for them, particularly within the confines of the law.<sup>51</sup> This is an issue that Congress should address.

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<sup>42</sup> *Drugs, Brains, and Behavior: The Science of Addiction*, NAT’L INST. DRUG ABUSE (July 2020), <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drugs-brain>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *The History and Statistics of Drug and Alcohol Addiction*, MISSION HARBOR BEHAV. HEALTH, <https://sbtreatment.com/addiction> (last visited Feb. 5, 2021).

<sup>51</sup> Volkow, *supra* note 7.

### III. STANDARDS OF REVIEW

When legislators pass a law, it is subject to one of three types of scrutiny to determine its constitutionality: rational basis, strict, or intermediate.<sup>52</sup> The A.D.A. is examined under a rational basis review.

#### A. Rational Basis

This is the lowest tier of scrutiny, which is extremely deferential and enjoys a “strong presumption of validity” in which the plaintiff must refute.<sup>53</sup> Here, the law will be upheld if the statute’s classification is “rationally related” to a legitimate state interest and there must be a reasonable connection between the means used and the goal it was intended to achieve.<sup>54</sup>

For example, the Louisiana Supreme Court upheld, and the United States Supreme Court affirmed, a law requiring potential state pilots to complete an apprenticeship before becoming licensed.<sup>55</sup> The legislation appears neutral on its face, but, since the apprenticeship requires working with an existing state pilot and such state pilots only hire relatives and friends,<sup>56</sup> the effect may be discriminatory towards those who are not friends or relatives of existing pilots. The Supreme Court held that the statute was related to the objective of the pilotage law, “which is to secure the safest and most efficiently operated pilotage system practicable,” and thus did not violate the equal protection clause.<sup>57</sup> In its decision, the Court also acknowledged that “the result is generally to limit new pilots to those who are relatives of incumbent pilots . . . .”<sup>58</sup> The Court further stated that it could “only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve.” This case is an example of how applying the rational basis may result in an irrational outcome: allowing nepotism in hiring state

<sup>52</sup> See generally Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527 (2014).

<sup>53</sup> *Rational Basis Test*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/rational\\_basis\\_test](https://www.law.cornell.edu/wex/rational_basis_test) (last visited Mar. 14, 2020).

<sup>54</sup> *Id.*

<sup>55</sup> *Kotch v. Bd. Of River Port Pilot Cm’rs for New Orleans*, 209 La. 737, 763 (1946), *aff’d*, 330 U.S. 553, 564 (1947).

<sup>56</sup> *Id.* at 555.

<sup>57</sup> *Id.* at 564.

<sup>58</sup> *Id.*

pilots because the court believes the legislature “*might*”<sup>59</sup> have intended this result.

## B. Strict Scrutiny

The highest standard is strict scrutiny; to survive this standard, “the legislature must pass a law to further a compelling government interest and must have narrowly tailored the law to achieve that interest.”<sup>60</sup> Laws subject to strict scrutiny include those infringing upon a fundamental right<sup>61</sup> or involving a suspect classification.<sup>62</sup> The Supreme Court determines if a group qualifies as a “suspect class” by examining the group’s history of “systematic discriminatory treatment.”<sup>63</sup> The goal of applying this level of scrutiny is to afford additional protections to classes who fail to attract the attention of the legislator.<sup>64</sup>

In *Berkley v. United States*,<sup>65</sup> a reduction in force was issued and the Air Force Secretary released a Memorandum of Instruction (“M.O.I.”), which required differential treatment for minority and women officers. Specifically, the M.O.I. stated:

Your evaluation of minority and women officers must clearly afford them fair and equitable consideration. . . . In your evaluation of the records of minority and women officers, you should be particularly sensitive to the possibility that past individual and societal attitudes, and in some instances utilization of policies or practices, may have placed these officers at a

<sup>59</sup> *Id.* at 563.

<sup>60</sup> *Strict Scrutiny*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) (last visited Mar. 14, 2020).

<sup>61</sup> *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307 (1976) (citing U.S. CONST. amend. XIV) (naming uniquely private rights such as the right to vote, right of interstate travel, and rights guaranteed by the first amendment as fundamental rights).

<sup>62</sup> *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting that suspect classes include those concerning alienage, race, or religion). *See also Massachusetts*, 427 U.S. at 327 n.4 (including ancestry as a suspect class).

<sup>63</sup> *Craig v. Boren*, 429 U.S. 190, 219 (1976) (Rehnquist J., dissenting). *See also United States v. Carolene Products*, 304 U.S. 144, 155 n.4 (1938) (noting that suspect classes to receive strict scrutiny include groups that are composed of “discrete and insular minorities”).

<sup>64</sup> *Carolene*, 304 U.S. at 155 n.4.

<sup>65</sup> 287 F.3d 1076 (Fed. Cir. 2002).

disadvantage from a total career perspective. The Board shall prepare for review by the Secretary and the Chief of Staff, a report of minority and female officer selections as compared to the selection rates for all officers considered by the Board.<sup>66</sup>

The court took note of three factors with respect to the M.O.I. First, the report outlined distinct considerations that must be afforded to minority and female candidates and did not require the same for other officers, which is discriminatory on its face. Second, any decisions were to be subject to review by superiors, which by itself is likely a lawful common practice. However, inclusion of the third instruction, which did not simply require a report of general numbers of persons selected for termination, but rather “a comparison between the selection rates of minority and female officers and those of all officers, leads to an “unavoidable reading” that any decisions or selections regarding minorities or women “would be monitored for specific results.”<sup>67</sup> Accordingly, a strict scrutiny analysis was proper in this instance. Conversely, if the M.O.I. did not exclude individuals from benefits based on race and instead chose to undertake “outreach efforts” to broaden the pool of applicants, without disadvantaging another race or gender, strict scrutiny would have been inapplicable.<sup>68</sup>

The court in *Berkley* did not elaborate on its definition of “outreach efforts.” However, a strikingly similar case may shed some light. The Supreme Court granted certiorari in *Grutter v. Bollinger*,<sup>69</sup> where the University of Michigan Law School adopted an admission policy that aspires to “achieve diversity” by recognizing “many possible bases for diversity admissions.”<sup>70</sup> Such bases include “special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . .”<sup>71</sup> When challenged, the Court noted that

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<sup>66</sup> *Id.* at 1081. *See also* *Woodward v. United States*, 871 F.2d 1068, 1077 (Fed. Cir. 1989) (“[S]pecial deference must be given by a court to the military when adjudicating matters involving their decisions on discipline, morale, composition and the like, and a court should not substitute its views for the ‘considered professional judgment’ of the military.”).

<sup>67</sup> *Berkley*, 287 F.3d. at 1086.

<sup>68</sup> *Id.* at 1090.

<sup>69</sup> 539 U.S. 306 (2003).

<sup>70</sup> *Id.* at 316.

<sup>71</sup> *Id.* 315-16.

the plan did not operate as a quota, but instead was a factor examined during the admissions process.<sup>72</sup> It explained that applicants will not be excluded from consideration because they are not the “right color” as its qualifications are weighed fairly and competitively.<sup>73</sup> In sum, the Court held that a rejected applicant has “no basis to complain of unequal treatment under the Fourteenth Amendment” because the race-conscious program “does not unduly harm nonminority applicants” and was only considered a plus factor.<sup>74</sup>

Although the opinion in *Grutter* demonstrates that affirmative action laws based on certain suspect classifications may survive strict scrutiny, this particular plan will be limited in time.<sup>75</sup> The Court explained that any race-conscious admissions program must have a termination point as “a measure taken in the service of equity itself.”<sup>76</sup> These cases further highlight the undeniable barriers that must be surpassed to survive a strict scrutiny analysis regardless of affirmative action efforts or intentions.

### C. Intermediate Scrutiny

The middle tier of scrutiny is referred to as intermediate, which applies when a state or federal law discriminates based on certain protected classes, including gender and child illegitimacy.<sup>77</sup> Under intermediate scrutiny, “the challenged law must further an important government interest and must do so by means that are substantially related to that interest.”<sup>78</sup> Importantly, a court will consider the personal immutability and inability to change a characteristic or trait

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<sup>72</sup> *Id.* at 334.

<sup>73</sup> *Id.* at 341.

<sup>74</sup> *Id.* (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978)).

<sup>75</sup> *Id.* at 342. *See also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989) (explaining that a city-imposed plan to offer 30% of contracts to minority-owned businesses “did not further a compelling governmental interest” because there was no evidence of prior discrimination by the city, and the 30% numerical value “was not narrowly tailored to accomplish a remedial purpose”).

<sup>76</sup> *Grutter*, 539 U.S. at 342.

<sup>77</sup> *Intermediate Scrutiny*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/intermediate\\_scrutiny](https://www.law.cornell.edu/wex/intermediate_scrutiny) (last visited Mar. 14, 2020).

<sup>78</sup> *Id.*

when determining if a particular group is entitled to an intermediate standard of review.<sup>79</sup>

Similar to the affirmative action programs in *Berkley* and *Gutter*, the Miami-Dade County Fire Department enacted a plan to recruit more female firefighters, which had a goal of hiring 36% females for entry-level positions.<sup>80</sup> This percentage took into account various factors including: census data, number of female applicants compared to those currently employed, whether there was evidence of past discrimination within the department, and lack of interest in applying for the job.<sup>81</sup> The court noted that an intermediate scrutiny analysis was proper because the classification was based upon gender.<sup>82</sup> An examination of the department's employment records at the time the program began revealed only 1% of the work force identifying as female.<sup>83</sup> This fact, coupled with an increase in female applicants, motivated the court to declare the plan constitutional because "redressing past discrimination against women" is "substantially related to an important government interest."<sup>84</sup>

#### **D. Method and Result of Raising the Level of Scrutiny Applied to A.D.A.**

If the Supreme Court ever finds that laws adversely affecting individuals with disabilities are entitled to a higher level of scrutiny, rather than the rational basis test, it will have to examine the potential effects of both intermediate and strict scrutiny when advancing the objectives of the A.D.A.

The Supreme Court has the power to increase the level of scrutiny as applied to the A.D.A. However, it must be careful in its decision and consider the detrimental effect of applying strict scrutiny. Scholars have noted that only 30% of laws survive the strict scrutiny analysis because they must be "narrowly tailored to further a

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<sup>79</sup> *Frontiero v. Richardson*, 411 U.S. 677, 677-78 (1973) (holding that "classifications based upon sex are inherently invidious" as it "is an immutable characteristic determined solely by the accident of birth").

<sup>80</sup> *Danskine v. Miami Dade Fire Dept.*, 253 F.3d 1288 (11th Cir. 2001).

<sup>81</sup> *Id.* at 1298.

<sup>82</sup> *Id.* at 1294.

<sup>83</sup> *Id.* at 1296.

<sup>84</sup> *Id.* at 1294-95.

compelling government interest.”<sup>85</sup> To implement an affirmative action program, such as Social Security, classifications of disabled individuals are required and will likely fail a strict scrutiny analysis.<sup>86</sup> A number of programs similar to Social Security have failed the strict scrutiny analysis, and thus, the Social Security program would likely fail as well.<sup>87</sup> Strict scrutiny is extraordinarily stringent and applying it to the A.D.A. will ultimately frustrate the purpose of the A.D.A., which is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>88</sup>

Conversely, applying the intermediate scrutiny standard to the A.D.A. will afford additional protections and prevent irrational decisions rendered under the rational basis standard. Individuals with disabilities are “discrete and insular minorities” who ensured a history of systematic discrimination, which should give rise to an intermediate analysis.<sup>89</sup> Empirical evidence displays that roughly 12.6% of disabled individuals are unemployed, which is much higher than the percentage for those without a disability (7.9%).<sup>90</sup> One may argue that the disabled class is too large to be considered “discrete and insular.” The counterargument is that many other large groups, such as transgender individuals, women, and communities of color, which previously possessed little political power, have managed to invoke change by

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<sup>85</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006); see also Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 575 (2016).

<sup>86</sup> See *Benefits for Disabilities*, SOC. SEC. ADMIN., <https://www.ssa.gov/disability> (last visited Nov. 27, 2021).

<sup>87</sup> *Rothe Dev. Corp. v. Dep’t of Defense*, 545 F.3d 1023, 1027 (Fed. Cir. 2008) (holding that awarding five percent of federal defense funds for each fiscal year to “socially and economically disadvantaged individuals” was unconstitutional on its face); *Dallas Firefighters Ass’n v. City of Dallas*, 150 F.3d 438, 442 (5th Cir. 1998) (holding that race- and gender-conscious promotions were unconstitutional); *Monetary Mechanical Co. v. Wilson*, 125 F.3d 702, 716 (9th Cir. 1997) (stating that a statutory list of groups deemed “minorities” was not narrowly tailored because the groups listed “were highly unlikely to have been discriminated against in the California Construction industry” and thus unconstitutional).

<sup>88</sup> 42 U.S.C. § 12101(b).

<sup>89</sup> See *Rennesse v. Lane*, 541 U.S. 509, 516 (2004); see also Peri Meldon, *Disability History: The Disability Rights Movement*, NAT’L PARK SERV. (Dec. 13, 2019), [https://www.nps.gov/articles/disabilityhistoryrights\\_movement.htm](https://www.nps.gov/articles/disabilityhistoryrights_movement.htm).

<sup>90</sup> Press Release, Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics—2020* (Feb. 24, 2021).



fueling the passage of many laws and obtaining judgments in their favor.<sup>91</sup> These instances show that the Court has discretion to deem certain “large” groups as “discrete and insular.” Moreover, the A.D.A. acknowledges that disabled individuals are “outright intentional[ly] excluded” from consideration in employment, benefits due to qualification standards and criteria.<sup>92</sup> The Act further states that, unlike individuals who have been discriminated against on the basis of color, gender, religion, national origin, or age, there is no legal recourse for disabled individuals.<sup>93</sup>

The history of discrimination against individuals with disabilities reveals itself, not only in society, but also in certain judicial decisions.<sup>94</sup> In *Cleburne*, the Court noted that “through ignorance and prejudice the [developmentally disabled] ‘have been subjected to a history of unfair and often grotesque mistreatment.’”<sup>95</sup> As far back as 1881, laws were passed with the goal of ridding the streets of all obstructions; however, the term “obstruction” referred to “diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object.”<sup>96</sup> Notably, many character traits of disabilities, though not all, are manifested in the person’s appearance and “determined solely by the accident of birth.”<sup>97</sup> It is also true that some disabilities may manifest over time and develop late in the person’s life, which is the definition of a mutable characteristic. However, disabilities that manifest themselves over time can be analogous to the circumstances involving homosexual or lesbian individuals; it is known that sexual orientation is not something a person can choose,

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<sup>91</sup> See CONST. amends. XIII, VI; 42 U.S.C. § 2000e; *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883, 892 (11th Cir. 2016) (ruling in favor of an employee who was terminated from her employment because she was transgender); *Glen v. Brumby*, 724 F. Supp. 2d 1284 (N.D. Ga. 2010), *aff’d*, 663 F.3d 1312 (11th Cir. 2011) (ruling in favor of an employee discriminated against on the basis of her gender identity).

<sup>92</sup> 42 U.S.C. § 12101(a)(4).

<sup>93</sup> *Id.*

<sup>94</sup> *Buck v. Bell*, 247 U.S. 200, 207 (1927) (Justice Holmes stating that “[t]hree generations of imbeciles [is] enough”).

<sup>95</sup> *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 444 (1985) (Stevens, J., concurring).

<sup>96</sup> Elizabeth Greiwe, *How an ‘Ugly Law’ Stayed on Chicago’s Books for 93 Years*, CHI. TRIBUNE (June 23, 2016), <https://www.chicagotribune.com/opinion/commentary/ct-ugly-laws-disabilities-chicago-history-flashback-perspec-0626-md-20160622-story.html>.

<sup>97</sup> *Frontiero v. Richardson*, 411 U.S. 677, 677-78 (1973).

rather, it is biological in nature and may become known to individuals early or later in their lifetime.<sup>98</sup> Similarly, certain disabilities, such as a substance use disorder, are embedded in our genetic composition at birth and can be revealed over time due to the MAO-A gene.<sup>99</sup> Accordingly, the “immutable” traits that allow courts to apply intermediate scrutiny to laws affecting LGBTQ individuals should apply to disabled individuals as well. Neither group has the power to change their biological features but only one group is afforded a greater level of protection under the law.

Courts determine what group constitutes a suspect class by examining the following criteria: (1) whether the group is composed of discrete and insular minorities, as viewed from a social, cultural, and political perspective;<sup>100</sup> (2) if there is a history of unequal treatment, which can be exhibited through stigmatizing such individuals;<sup>101</sup> (3) the immutability of the group’s defining trait;<sup>102</sup> and (4) whether the group’s common characteristic is related to the legislative enactment.<sup>103</sup>

As applied in cases concerning a disability, courts assess if the disability adversely affects the individual’s ability to become a productive member of society.<sup>104</sup> It has been noted that, unlike immutable traits such as race, color, or national origin, a disability may impair one’s ability to complete certain tasks, which then requires “reasonable accommodations,” and is thus relevant to the legislator’s purpose.<sup>105</sup> However, satisfying all four factors would likely render disabled individuals as a suspect class earning strict scrutiny, which may hinder the A.D.A.’s goal.<sup>106</sup> By examining the remaining three factors, one could find that disabled individuals are discrete and insular because they lack political power, they are discriminated against by

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<sup>98</sup> *Sexual Orientation*, NEMOURS (May 2018), <https://kidshealth.org/en/parents/sexual-orientation.html>.

<sup>99</sup> See *infra* Section II and accompanying text.

<sup>100</sup> *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 478 nn.10 & 24 (1985).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 432.

<sup>105</sup> 42 U.S.C. § 12111(8).

<sup>106</sup> *Id.* at § 12101(a)(7).

both the general population<sup>107</sup> and legislative actions,<sup>108</sup> and their defining trait is immutable because their genetic composition is beyond their control.<sup>109</sup>

If the A.D.A. was subject to intermediate scrutiny, there would be no presumption of validity and would require the law to be “substantially related to a governmental purpose” by examining whether the law furthers an important government interest and use means that are “substantially related to that interest.”<sup>110</sup> The goal of the A.D.A. is to eliminate discrimination and, by applying the rational basis test to employer actions, it essentially abolishes constitutional remedies to those who have fallen victim to political process failures.<sup>111</sup> For example, a “reasonable accommodation” is granted to disabled individuals only when it “bears zero cost burden” on the employer.<sup>112</sup> Furthermore, the Supreme Court gives employers extreme discretion in its employment considerations, as it should. However, as applied to substance use disorders, an employer with no scientific or medical background ultimately has sole discretion in determining whether an individual is a “current user,” regardless of whether he completed a treatment program and refrained from illicit substance use.<sup>113</sup> By increasing the level of scrutiny to intermediate, the government would bear the burden of establishing a law’s constitutionality, rather than the alleged discrimination victim.<sup>114</sup> This change has the potential to align judicial decisions with the true intent of the A.D.A.:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central

<sup>107</sup> See Volkow, *supra* note 4 and accompanying text.

<sup>108</sup> See Greiwe, *supra* note 96 and accompanying text.

<sup>109</sup> *Cleburne*, 473 U.S. at 438.

<sup>110</sup> *Intermediate Scrutiny*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/intermediate\\_scrutiny](https://www.law.cornell.edu/wex/intermediate_scrutiny) (last visited Mar. 14, 2020).

<sup>111</sup> Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 554 n.5 (2014).

<sup>112</sup> Jayne Ponder, *The Irrationality of Rational Basis Review for People With Disabilities*, 53 HARV. C.R.-C.L. L. REV. 709, 714 (2018).

<sup>113</sup> See *Mauerhan v Wagner Corp.*, 649 F.3d 1180, 1186-87 (10th Cir. 2011).

<sup>114</sup> *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002).

role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.<sup>115</sup>

Constitutional law requires equal protection for all and allows for legal recourse if a law imposes on those protections. Under the rational basis test, disabled individuals are ill-equipped to prevail in many adverse employment actions. This group has limited political power and a history of discrimination due to its common immutable, genetic character trait. It is the Court's and legislature's responsibility to ensure the rights of the disabled are not imposed upon and may achieve this goal by applying intermediate scrutiny to the A.D.A.

#### **IV. CURRENT EFFECTS OF RATIONAL BASIS REVIEW UNDER THE A.D.A.**

##### **A. Alcohol Use Disorders are Protected Under the A.D.A.**

The A.D.A. may grant protection to an individual with a mental or physical disability, provided they satisfy certain requirements. In order to establish a prima facie case of discrimination under the A.D.A., plaintiffs must show that: (1) they are disabled within the A.D.A.'s meaning; (2) they are qualified to perform the essential functions of the job in question with or without reasonable accommodation; or (3) they were subjected to adverse employment action due to their disability.<sup>116</sup> "Reasonable accommodation" includes providing "modified work schedules, reassignment to a vacant position, . . . training materials or policies," in a manner that allows the individual to perform the essential functions of the position.<sup>117</sup>

People currently struggling with alcohol use disorder may be afforded employment protection under the ADA if the individual

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<sup>115</sup> 42 U.S.C. § 12101(B).

<sup>116</sup> *Id.* § 12111(8).

<sup>117</sup> *Id.* § 12111(9).

(1) is unable to perform one or more major life activities that the average person in the general population can perform or (2) is significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that activity.<sup>118</sup>

Moreover, courts will consider how severe the impairment is, how long the impairment will exist, and any long-term effects resulting from the impairment.<sup>119</sup> Generally, the term “major life activities include[s], but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>120</sup>

In *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*,<sup>121</sup> an employee demonstrated an excellent work performance but failed to comply with a company rule requiring employees to request unscheduled leave at least one hour before the scheduled shift began.<sup>122</sup> Within a two-year period, the employee violated this rule fourteen times.<sup>123</sup> Since the employee admitted to his supervisors that his alcoholism caused the violations before the proposal to terminate him, he was entitled to reasonable accommodations.<sup>124</sup>

The United States Court of Appeals for the Federal Circuit noted that the alcohol use disorder satisfied the requirement of a disability within the A.D.A. because the employee can complete the necessary responsibilities of his employment with a reasonable accommodation, such as a modified work schedule.<sup>125</sup> Furthermore, it was evident that the employee’s current alcohol use disorder adversely affected his ability to attend work and timely inform his superiors of

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<sup>118</sup> Renee Parsons & Thomas J. Speiss III, *Does the Americans With Disabilities Act Really Protect Alcoholism?*, 23 GEN. PRAC. SOLO 38, 38 (2006).

<sup>119</sup> *Id.*

<sup>120</sup> 42 U.S.C. § 12102(2)(a).

<sup>121</sup> 95 F.3d 1102 (Fed. Cir. 1996).

<sup>122</sup> *Id.* at 1104.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1105-06.

his intended absences, which constituted major life activities.<sup>126</sup> The court reasoned that allowing the employee to attend a treatment program was an essential accommodation for any individual suffering from alcohol use disorder; but if he refused treatment, “discipline would be appropriate.”<sup>127</sup>

The court in *Office of Senate Sergeant at Arms* properly considers a variety of factors in its determination simply because the employee’s disorder was the result of alcohol rather than an illicit substance. However, while this court held that unexcused absences from work caused by current alcohol use disorder was a “substantial limitation of a major life activity,”<sup>128</sup> the same does not apply to individuals currently suffering from illicit substance use disorder. We examine the legal distinctions now.

### **B. Current Substance Use Disorders are Not Protected Under the A.D.A.**

The A.D.A. does not grant employment protection to individuals who currently use illegal substances.<sup>129</sup> Regarding illicit substance use disorders, the A.D.A. may grant protection for individuals who are: (1) successfully rehabilitated and no longer use illegal drugs; (2) currently participating in a treatment program and no longer using illicit drugs; or (3) erroneously regarded as illegal users.<sup>130</sup> The structure of the A.D.A. with respect to successfully rehabilitated individuals may seem straightforward; however, additional requirements were imposed by judicial decisions that increasingly impaired the scope of protection for such individuals under the A.D.A.<sup>131</sup>

In *Skinner v. City of Amsterdam*,<sup>132</sup> an employee worked for the city for eighteen years and passed between six and ten drug and alcohol tests before injuring his back.<sup>133</sup> The employee was then

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<sup>126</sup> *Id.* at 1106.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> 42 U.S.C. § 12114(b).

<sup>130</sup> *Id.*

<sup>131</sup> Judith Johnson, *Rescue the Americans With Disabilities Act from Restrictive Interpretations: Alcohol as an Illustration*, 27 ILL. U. L. REV. 169, 171 (2007) (discussing the Supreme Court’s interpretations of ADA provisions).

<sup>132</sup> 824 F. Supp. 2d 317 (N.D.N.Y. 2010).

<sup>133</sup> *Id.* at 321.

prescribed painkillers to treat his back and he subsequently became addicted to them.<sup>134</sup> After sustaining this injury, he failed a required drug and alcohol test and was suspended, without pay, for six months.<sup>135</sup> The employee was required to complete a rehabilitation program during his suspension period.<sup>136</sup> Upon completion of the program and his return to work, numerous complaints were filed against him for leaving work sites without notifying his subordinates.<sup>137</sup> After he refused to submit to another drug and alcohol test, the employee was discharged.<sup>138</sup>

The United States District Court for the Northern District of New York noted that “[the employee] was able to successfully perform his job without drugs impacting his work.”<sup>139</sup> On the other hand, he was unable to carry out his duty of overseeing his work-crew due to unexcused absences, which stemmed from substance abuse issues.<sup>140</sup> In this case, the court did not need to determine whether the employee suffered from an adverse action since current illicit substance use is not protected under the A.D.A.<sup>141</sup> Notably, while the A.D.A. does not define the term “impairment,” the Equal Employment Opportunity Commission (“E.E.O.C.”) has issued administrative regulations, utilized by the A.D.A., which help define the term.<sup>142</sup> The E.E.O.C. provides that a physical or mental impairment, including an emotional or mental issue, substantially limits a major life activity when the individual is unable to perform a major life activity that the average person in the general population can perform.<sup>143</sup> Thus, the employee

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<sup>134</sup> *Id.* While no genetic tests were conducted, it is possible that the employee in this case had genetic markers that promoted his addiction to illicit substances. There was no evidence of a prior substance use disorder, as the employee continuously provided negative drug and alcohol tests for a period of eighteen years. *Id.*

<sup>135</sup> *Id.* at 322.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 321.

<sup>138</sup> *Id.* at 322.

<sup>139</sup> *Id.* at 323.

<sup>140</sup> *Id.* at 321.

<sup>141</sup> *Id.* at 330.

<sup>142</sup> *Id.* at 325.

<sup>143</sup> *Id.* at 327 (citing 29 C.F.R. § 1630.2(j)(1)) (“The word ‘substantial’ ... precludes impairments that interfere in only a minor way with the performance of a major life activity from qualifying disabilities.”). Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. 12102(2)(a).

in *Skinner* likely suffered from an impairment that substantially affected his ability to work, which under the A.D.A. is a major life activity. Accordingly, the court likely would have granted the employee an accommodation if such disorder stemmed from alcohol rather than an illicit substance. As a society, it is terrible that we stand by idly as courts essentially rank the importance of one's well-being based on the type of substance they are struggling with.

Factually, the court explained that a substance use disorder is an impairment that is "significantly more severe than those encountered by ordinary people in everyday life."<sup>144</sup> Cravings and withdrawals govern many decisions made by the afflicted individual.<sup>145</sup> Specifically, alcohol or drug use impairs the individual's ability to think, plan, solve problems, make decisions and exert self-control over impulses in the same manner.<sup>146</sup> All of these adverse effects are considered major life activities under the A.D.A.; the only obstacle preventing this class of individuals from employment protection is the discriminatory effect of the current structure of the A.D.A. Both alcohol and illicit substances affect the mind and body in similar ways.<sup>147</sup> Therefore, if the A.D.A. truly intends to protect all individuals with mental or physical disabilities from discrimination, then those currently struggling with drug addiction should be afforded the same protection as those currently struggling with alcohol addiction.

Overall, the A.D.A. protects individuals who have an impairment that substantially limits a major life activity, which includes sleeping, working, eating, and thinking.<sup>148</sup> Based on this definition of a substantial limitation of a major life activity, individuals currently struggling with a drug use disorder should be afforded

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<sup>144</sup> 824 F. Supp. 2d at 327.

<sup>145</sup> *Drugs, Brains, and Behavior: The Science of Addiction*, NAT'L INST. ON DRUG ABUSE (July 2020), <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drugs-brain>.

<sup>146</sup> *Id.*

<sup>147</sup> See generally *supra* Section II. See also *Drugs, Brains, and Behavior: The Science of Addiction*, NATIONAL INSTITUTE ON DRUG ABUSE (July 2020), <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drugs-brain> (discussing the long- and short-term effects drugs have on the brain); *Excessive Alcohol Use*, CTR. DISEASE CONTROL & PROT. (Nov. 23, 2021), <https://www.cdc.gov/chronicdisease/resources/publications/factsheets/alcohol.htm> (discussing the long- and short-term effects alcohol has on the brain).

<sup>148</sup> 42 U.S.C. § 12102(3)(a).



protection. The only real distinction under the law between alcohol and illicit substances is that one is legal, while the other is not. While this is true, the adverse effects of alcohol and illicit substances bear many similarities, such as the detrimental effects on the mind and body. Moreover, both disorders are diagnosed on the same eleven-point scale under the Diagnostic and Statistical Manual of Mental Disorders (“DSM-V”).<sup>149</sup> The DSM-V is the manual utilized by healthcare professionals and provides information about mental disorders including descriptions of the illness, symptoms, and diagnosis criteria.<sup>150</sup> Thus, the fact that substance use disorders and alcohol use disorders are graded by physicians using the same scale indicates that the medical similarities between the two are substantial. Appropriately, Congress should consider adopting an analogous approach by affording the same protections to those struggling with an illicit substance use disorder as those with an alcohol use disorder.<sup>151</sup> Instead, judicial interpretations of the A.D.A. are limiting the protections afforded to individuals with a substance use disorder, while the laws that protect those with an alcohol use disorder remain unencumbered.

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<sup>149</sup> Elizabeth Hartney, *DSM 5 Criteria for Substance Use Disorders*, VERY WELL MIND, <https://www.verywellmind.com/dsm-5-criteria-for-substance-use-disorders-21926> (Mar. 21, 2020). The eleven-point scale measures the severity of a substance use disorder over a twelve month period (2-3 symptoms is mild; 4-5 symptoms is moderate; 6 or more symptoms is severe). *Id.*

<sup>150</sup> See *DSM-5: Frequently Asked Questions*, AM. PSYCH. ASS’N (2020), <https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions>. Hartney, *supra* note 149.

1. Taking the substance in larger amounts or for longer than you’re meant to; 2. Wanting to cut down or stop using the substance but not managing to; 3. Spending a lot of time getting, using, or recovering from use of the substance; 4. Cravings and urges to use the substance; 5. Not managing to do what you should at work, home or school because of the substance use; 6. Continuing to use, even when it causes problems in relationships; 7. Giving up important social, occupational, or recreational activities because of substance use; 8. Using substances repetitively even when it puts you in danger; 9. Continuing to use, even when you know you have a physical or psychological problem that could have been caused or made worse by the substance; 10. Needing more of the substance to get the effect you want (tolerance); 11. Development of withdrawal symptoms, which can be relieved by taking more of the substance.

*Id.*

<sup>151</sup> *Id.*

### C. A.D.A.—Power to the Employers

#### 1. “Employers Decide if an Individual is a ‘Current’ Substance User

The A.D.A does not guarantee employment protection for individuals who previously completed a supervised treatment program and are no longer engaging in the use of illicit substances; this is the result of judicial interpretation.<sup>152</sup> The Tenth Circuit ruled that an employer is justified in excluding an applicant from employment consideration “if the drug use was sufficiently recent to justify the employer’s reasonable belief that the drug abuse remained an ongoing problem.”<sup>153</sup>

Notably, there is little guidance and no legal method provided in making such a determination. Regardless, studies have shown that substance and alcohol use disorders are not the result of voluntary behavior.<sup>154</sup> Thus, categorizing an individual as a “current” illicit substance user is immaterial when determining if such individual should be afforded the right to attend treatment or receive a reasonable accommodation. This is because all substance abuse disorders are recognized as disabilities beyond the individual’s control, as supported by the DSM-V.<sup>155</sup>

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<sup>152</sup> Mauerhan v. Wagner Corp., 649 F.3d 1180 (10th Cir. 2011).

<sup>153</sup> *Id.* at 1186. The Tenth Circuit acknowledged that the Second Circuit also applies a similar test when determining if someone is “currently” engaging in substance use.

[W]hether an employee was a “current substance abuser” at the time of discharge depends on whether the employer held a reasonable belief that [he] has a current substance abuse problem . . . that is, whether the employee’s substance abuse problem is severe and recent enough so that the employer is justified in believing that the employee is unable to perform the essential duties of his job.

*Id.* at 1187. The Fourth Circuit adopted a similar test when determining if an individual is a “current” user:

currently means a periodic or ongoing activity in which a person engages . . . that has not yet permanently ended . . . [U]nder the plain meaning of the statutes, an employee illegally using drugs in a periodic fashion during the weeks and months prior to discharge is “currently engaging in the use of illegal drugs.”

*Id.*

<sup>154</sup> *Drug Addiction: Is it a Disease or is it Based on Choice? A Review of Gene Heyman’s Addiction: A Disorder of Choice*, UNIV. OF FLA. (Mar. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3047254>.

<sup>155</sup> See *supra* notes 149-51 and accompanying text.

**i. “Employer’s Reasonable Belief”  
Defeats the A.D.A.**

In *Mauerhan v. Wagner Corporation*,<sup>156</sup> an employee was subjected to a drug and alcohol test after working at the facility for eleven years and informed his superiors that he would test positive.<sup>157</sup> Upon the employee’s termination, the employee was informed that he may return to work if he could remain free from illicit substances.<sup>158</sup> The employee subsequently completed a thirty-day treatment rehabilitation program and asked his employer if he may return to work.<sup>159</sup> While the employer agreed to rehire the former employee back to his previous position with the same responsibilities, the employer refused to provide the same level of compensation as he previously received.<sup>160</sup> In response, the employee refused the new compensation terms and provided a sworn declaration that he has maintained drug-free since entering and completing the rehabilitation program.<sup>161</sup> With no reply, the employee subsequently filed a suit against the employer claiming he was protected under the A.D.A., whereas the employer argued the former employee was a “current” drug user within the meaning of the A.D.A.<sup>162</sup> Although the Tenth Circuit did not define “currently engaging” with respect to illicit substance use, the court held that thirty days was not long enough to be deemed successfully rehabilitated and determined that said employee was still considered a “current” drug user within the meaning of the A.D.A.<sup>163</sup>

Interestingly, the plain language of the A.D.A. states that an individual has a qualifiable disability when he “has *successfully completed a supervised drug rehabilitation program* and is *no longer engaging in the illegal use of drugs*, or has otherwise been rehabilitated successfully and is no longer engaging in such use.”<sup>164</sup> Therefore, the court’s analysis concluding that the former employee in *Mauerhan* was a current drug user is inconsistent with the expressly stated terms of

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<sup>156</sup> 649 F.3d 1180 (10th Cir. 2011).

<sup>157</sup> *Id.* at 1183.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1184.

<sup>163</sup> *Id.* at 1185-86.

<sup>164</sup> 42 U.S.C. § 12114(b)(1) (emphasis added).

the A.D.A.<sup>165</sup> Moreover, the employer essentially took advantage of the employee's disability<sup>166</sup> by giving him an ultimatum: either resume your former position with the same responsibilities for less pay or face termination.<sup>167</sup> This exploitation is precisely the type of conduct that the A.D.A. was enacted to prevent.<sup>168</sup> Instead of applying the A.D.A.'s terms as written, the court imposed an additional requirement by stating that an individual is a "current" user "if the drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem."<sup>169</sup> This requirement is extremely vague and has the potential to grant overly broad discretion to employers, which in turn, can exclude a number of individuals who may otherwise qualify for protection under the A.D.A.<sup>170</sup>

To address this issue, courts should provide additional guidance by setting forth specific requirements or timeframes that would allow employers to assess what constitutes a "current" illicit substance user. For example, when diagnosing someone with a substance use disorder, physicians will inquire about patterns of use over the previous twelve months.<sup>171</sup> Then, physicians will identify whether the person has two or more signs of addiction over that time period.<sup>172</sup> Currently, employers are not required to possess any particular set of skills or knowledge that would justify the broad deference afforded to them in assessing if someone is a "current" illicit substance user; nor are they required to defer to a professional in making their determination. If either the Court or Congress implements a set of guidelines to assess whether someone is a "current" user in a legal forum, employers would still have a degree of deference without it unjustly affecting employees.

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<sup>165</sup> See *id.* See also *Mauerhan*, 649 F.3d at 1183 (explaining that the employee completed a supervised treatment program and refrained from engaging in illicit substance use upon completion of the program).

<sup>166</sup> *DSM-5*, *supra* note 150 (concluding that addiction to an illicit substance is a disability).

<sup>167</sup> *Mauerhan*, 649 F.3d at 1183.

<sup>168</sup> 42 U.S.C. § 12101(b)(1).

<sup>169</sup> *Mauerhan*, 649 F.3d at 1187.

<sup>170</sup> See *id.* at 1185.

<sup>171</sup> Adam Felman, *How Does a Doctor Diagnose Addiction?*, MED. NEWS TODAY (Nov. 2, 2018), <https://www.medicalnewstoday.com/articles/323487>.

<sup>172</sup> See *id.*; see also *DSM-5*, *supra* note 150 and accompanying text (examining the twelve criteria utilized by physicians to analyze whether someone has a substance use disorder).

Alternatively, the court in *Mauerhan* could have applied the requirements set forth in the A.D.A. as they are plainly written, which does not impose the problematic and overly broad time requirement.<sup>173</sup> The legislative history of the A.D.A. states that Congress intended to provide a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>174</sup> The term “comprehensive” is an essential word to the A.D.A.’s construction, which suggests the requirements set forth in the A.D.A. were intended to be complete and all-inclusive.<sup>175</sup> To determine a statute’s intent, courts must look to the plain meaning of the words contained in the statute and apply their usual and ordinary meanings, as expressed in numerous federal court decisions.<sup>176</sup> Since the statute omits individuals who have “successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs” from the “current” user category,<sup>177</sup> the Tenth, Fourth, and Second Circuits improperly granted employers the power to circumvent the plain language of the A.D.A. and render a decision based on the employer’s own personal “reasonable belief.”<sup>178</sup> Consequently, by failing to comply with the plain meaning rule, the clear line between being considered a “current” user and “successfully rehabilitated” is becoming increasingly blurred as a result of judicial interpretation.<sup>179</sup>

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<sup>173</sup> 42 U.S.C. § 12114(b).

<sup>174</sup> *Id.* § 12101(b)(1).

<sup>175</sup> *Id.* § 12101(b).

<sup>176</sup> *See, e.g., In re Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992); *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 596 (10th Cir. 1996); *Green-Brown v. Sealand Servs., Inc.*, 586 F.3d 299 (4th Cir. 2009); *Virgilio v. City of New York*, 407 F.3d 105, 112 (2d Cir. 2005). *See also* MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/plain%20meaning%20rule> (last visited Nov. 2, 2021); *Statutory Construction*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/statutory\\_construction](https://www.law.cornell.edu/wex/statutory_construction) (last visited Nov 2. 2021).

<sup>177</sup> 42 U.S.C. § 12114(b)(1).

<sup>178</sup> *See Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1186-87 (10th Cir. 2011) (citing *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 520 (2d Cir. 1991); *Shafer v. Preston Mem’l Hosp. Corp.*, 107 F.3d 274, 278 (4th Cir. 1997)).

<sup>179</sup> *Mauerhan*, 649 F.3d at 1187.

**ii. “Neutral No Rehire Policy” May Not Violate the ADA**

Another judicial interpretation that gave employers the potential to circumvent the A.D.A. and engage in discriminatory practices was *Raytheon Co. v. Hernandez*.<sup>180</sup> In this case, an employee violated a workplace rule one time by testing positive for an illicit substance during a random drug test and was forced to resign.<sup>181</sup> Two years later, the former employee reapplied for his prior position and was rejected.<sup>182</sup> He alleged that he was a victim of workplace discrimination because his reapplication, accompanied by two letters speaking positively about him as a potential employee,<sup>183</sup> was rejected by the employer who cited an “unwritten policy” against rehiring individuals who previously violated a workplace rule.<sup>184</sup> Notably, the Ninth Circuit originally held that an “employer’s unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules violated the A.D.A.” as it essentially “screens out persons with a record of addiction.”<sup>185</sup> However, the Supreme Court granted certiorari and vacated, explaining that the Ninth Circuit incorrectly applied a disparate impact analysis to the former employee’s disparate treatment claim, and reversed the decision.<sup>186</sup> Upon review, the Court noted that if the Ninth Circuit correctly applied a disparate treatment claim, it would have concluded that a neutral no rehire policy is a legitimate nondiscriminatory reason

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<sup>180</sup> 540 U.S. 44 (2003).

<sup>181</sup> *Id.* at 47.

<sup>182</sup> *Id.*

<sup>183</sup> One letter was from his pastor stating that the former employee regularly participated in church activities; the other was from an Alcoholics Anonymous sponsor stating that the former employee attended meetings regularly and has made significant progress in his recovery. *Id.*

<sup>184</sup> *Id.* at 44.

<sup>185</sup> *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1030, 1033, 1036 (9th Cir. 2002).

<sup>186</sup> *Raytheon*, 540 U.S. at 51. Disparate impact arises when a seemingly neutral employment practice negatively affects one group more harshly than other groups and cannot be justified by business necessity. *Id.* at 52. Disparate treatment has a more direct link to traditional discrimination; this occurs when an employer treats a class of individuals less favorably than others due to a protected characteristic. *Id.* However, the former employee failed to timely raise the disparate impact claim and was limited to a disparate impact claim. *Id.* at 44-45.

to reject an application under the A.D.A.<sup>187</sup> By being limited to a disparate treatment theory, the Court did not address whether a neutral no rehire policy has a disparate impact on individuals and violates the A.D.A. Instead, the Court expressly stated that a no rehire policy will survive the disparate treatment analysis and be found constitutional,<sup>188</sup> and left uncertainty as to whether employers can lawfully engage in such discriminatory practices.

## V. EQUALITY UNDER LAW

### A. The ADA is Overinclusive and Adversely Affects Law Abiding Citizens

The A.D.A.'s distinction between an individual suffering from an alcohol and illicit substance disorder is an overinclusive facet of this statute and is likely invalid under the Equal Protection Clause.

It was noted in *Meyer v. Nebraska*<sup>189</sup> that liberty interests cannot be interfered with "under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation" to a legitimate state purpose.<sup>190</sup> Granted, the state's legitimate purpose is to deter individuals from engaging in the use of illegal substances.<sup>191</sup> However, modern studies have shown that a person's addiction becomes biochemical in nature and may be exacerbated as a result of their genetic composition.<sup>192</sup> At this point, these individuals are not consciously choosing to violate the law; instead, they are driven by the chemical imbalance in their brain and they are being punished for it.<sup>193</sup>

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<sup>187</sup> *Id.* at 51.

<sup>188</sup> *Id.* at 52.

<sup>189</sup> 262 U.S. 390 (1923).

<sup>190</sup> *Id.* at 400.

<sup>191</sup> Samantha A. Hill, *The ADA's Failure to Protect Drug Addicted Employees Who Want to Seek Help and Rehabilitation*, UNIV. PENN. (2007), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1291&context=jbl>.

<sup>192</sup> See *Drugs, Brains, and Behavior: The Science of Addiction*, NAT'L INST. DRUG ABUSE (July 2020), <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drugs-brain>; Stogner & Gibson, *supra* note 25, at 358-59.

<sup>193</sup> Stogner & Gibson, *supra* note 25, at 358-59.

### 1. Scenario A

For example, similar to the circumstances presented in *Skinner*,<sup>194</sup> people may seek prescribed pain killers for a valid injury, such as a broken bone. However, once someone's injury has healed, it is entirely possible for that person to continue using the substance due to a chemical addiction in the brain.<sup>195</sup> At this point, the person is not choosing to violate the law. Rather, the addiction originated from an actual injury and later progressed due to the individual's chemical makeup.<sup>196</sup> Then, what was originally permissible behavior, suddenly shifts to a violation of the law when the predisposed individual becomes addicted to the substance and turns to alternative methods to fuel the addiction. Overall, the structure of the A.D.A. harms people who have not acted in a manner that violates the law; in fact, these individuals followed the law by seeking medical attention for their injury. Notably, a statute's classification must rest "upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similar circumstanced shall be treated alike."<sup>197</sup> Applying this framework, a person suffering from an illicit substance disorder, which stemmed from a legal prescription and was exacerbated by their genetic make-up, is not "similar[ly] circumstanced" as a person who willfully engaged in the use of an illicit substance from the start.<sup>198</sup>

The A.D.A., as currently applied, adversely impacts more people than necessary to achieve the government interest. To elaborate, individuals who legally obtain a substance due to an injury and subsequently become addicted to it cannot be deterred from engaging in criminal activity because their actions were lawful from the start. At this point, their addiction is the result of their brain's chemical make-up, and they may seek out alternative means to obtain

<sup>194</sup> See *supra* notes 132-43 and accompanying text.

<sup>195</sup> See *How Personal Injuries Can Lead to Addiction and Trigger Relapse*, UNITY BEHAV. HEALTH, <https://unityrehab.com/blog/personal-injuries-addiction-trigger-relapses> (last visited Mar. 12).

<sup>196</sup> *Can a Person Become Addicted to Medications Prescribed by a Doctor?*, NAT'L INST. ON DRUG ABUSE (Jan. 2018), <https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/frequently-asked-questions/can-person-become-addicted-to-medications-prescribed-by>.

<sup>197</sup> *Johnson v. Robinson*, 415 U.S. 361, 375 (1974).

<sup>198</sup> *Id.*



the substance; thus, due to a disability in which they have no control over, individuals will be driven to obtain the substance through illegal methods. Consequently, such a person may face adverse employment action if their employer becomes aware of the situation or if the employee requests an accommodation to seek treatment.<sup>199</sup>

## 2. *Scenario B*

Conversely, a person who obtains a substance from an illegal source is aware the actions are in violation of the law, even though that individual may be unaware of the risk of becoming addicted. Statistics from the National Survey on Drug Use and Health indicate that one in five people who experiment with drugs develop an addiction at some point.<sup>200</sup> The A.D.A., instead of targeting unlawful substance users, targets all substance users and must be revised to account for this distinction, which may prove difficult.<sup>201</sup> To accomplish this task, it would require examining a person's medical records to determine if the addiction stemmed from a legal or illegal source. This method would raise concerns under the Health Insurance Portability and Accountability Act because divulging such information to employers, when they are deciding to hire or fire someone, may result in further discrimination.<sup>202</sup>

By employing the above scenarios, it is clear that the current structure of the A.D.A. unfairly penalizes those who obtained a legal prescription and had no intention to become addicted to an illegal substance; yet the end result of their actions was an uncontrollable disability.<sup>203</sup> Regardless of how an individual's drug use began, each

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<sup>199</sup> Employers are not required to grant employees leave to attend a rehabilitation facility if their illicit substance use occurred within the timeframe of their employment. *See Raytheon v. Hernandez*, 540 U.S. 44, 46 (2003).

<sup>200</sup> Buddy T., *How Easy is it to Develop a Drug Addiction?*, VERY WELL MIND (Nov. 27, 2020), <https://www.verywellmind.com/how-quickly-can-i-become-addicted-to-a-drug-63030>. "Buddy T. is an anonymous writer and founding member of the Online Al-Anon Outreach Committee with decades of experience writing about alcoholism." *Id.*

<sup>201</sup> *See generally* 42 U.S.C. § 12114 (explaining that anyone who currently uses an illegal substance will not be afforded employment protection).

<sup>202</sup> Judi Hasson, *How Private is your Medical Info?*, AARP (Sept. 17, 2012), <https://www.aarp.org/caregiving/health/info-2017/how-private-is-medical-information.html>.

<sup>203</sup> *See supra* notes 149-50, 195-96 and accompanying text. *See also Skinner v. City of Amsterdam*, 824 F. Supp. 2d 317, 321 (N.D.N.Y. 2010) (displaying how an

will be unfairly punished and neither will be afforded employment protection under the A.D.A.

### 3. *Family Medical Leave Act is Inadequate to Protect Employees' Interest in Attending Rehabilitation Centers*

It is true that Section 2612 of the Family and Medical Leave Act ("F.M.L.A.") entitles an employee to a total of twelve workweeks of leave during any twelve-month period for a variety of purposes.<sup>204</sup> However, the F.M.L.A. sets forth specific prerequisites that must be satisfied first. An "eligible employee" must: (1) have been employed for at least twelve months by the employer; (2) have worked for at least 1,250 hours with such employer during the previous twelve months; and (3) work for a company that employs fifty or more workers within seventy-five miles of the work site.<sup>205</sup> Additionally, when the need for leave is foreseeable, at least thirty-day notice must be given to the employer to properly shield the employee from adverse employment action.<sup>206</sup> Attending a rehabilitation center may be a foreseeable need for leave; however, the waiting period before entry is unpredictable and may take a week, two weeks, a month, or sometimes, a single day.<sup>207</sup>

Accordingly, employees wishing to attend a drug rehabilitation center could request leave due to their own serious health condition rendering them unable to perform the functions of their position.<sup>208</sup> As

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individual may legally obtain prescription pain killers, develop an unforeseen addiction, and face adverse employment action as a result).

<sup>204</sup> 29 U.S.C. § 2612(a)(1). Such circumstances include the birth of a child, placing a child for adoption or foster care, to care for immediate family members with serious health conditions, because of the employee's own serious health conditions rendering him unable to perform the function of the position of such employee, or due to a qualifying exigency arising out of the fact that a family member of the employee is covered on active duty. *Id.*

<sup>205</sup> *Id.* § 2611(2)(A), (B)(ii).

<sup>206</sup> *Id.* § 2612(e)(1). See also Cristina Redko et al., *Waiting Time as a Barrier to Treatment Entry: Perceptions of Substance Users*, 36 J. DRUG ISSUES 831, 837 (2006). Many substance users endure several barriers that significantly challenge their ability to obtain treatment including waiting lists. It is important to note that "the longer substance users have to wait to be admitted to treatment, the more likely they are to not follow through with treatment." *Id.* at 831.

<sup>207</sup> Redko et al., *supra* note 206, at 837.

<sup>208</sup> 29 U.S.C. § 2612(a)(1).

such, the employer has the right to request medical documentation supporting a timely request for medical leave.<sup>209</sup> However, if the employer established a non-discriminatory policy stating that, under specific circumstances, an employee can be eliminated for substance abuse, then such a policy will override the individual's right to attend rehabilitation.<sup>210</sup> Therefore, the argument that employees suffering from a disability, such as a substance use disorder, have the right to attend treatment without adverse employment action is non-persuasive. Such individual must gamble as to whether there is a written or unwritten policy, such as the one in *Raytheon*, that prohibits continued employment of an individual who violated a single workplace rule, including failing a drug test.<sup>211</sup>

### **B. Congress Should Not Criminalize a Disability or Disease**

The Supreme Court held in *Robinson v. California*<sup>212</sup> that a statute which criminalized an illness, such as addiction, violated the Fourteenth Amendment and constituted cruel and unusual punishment.<sup>213</sup> The Court also noted that addiction is “an illness which may be contracted innocently or involuntarily.”<sup>214</sup> The purpose of enacting a law is to deter individuals from engaging in such conduct, but this is an ineffective method when the individual became addicted through obtaining the substance by legal means (by prescription). The Supreme Court further stated that “afflicted people may be confined either for treatment or for the protection of society, [but] they are not branded as criminals.”<sup>215</sup> Justice Douglas compared the criminalization of drug addiction to the lack of criminalization due to “insanity,” and explained that “[i]f addicts can be punished for their

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<sup>209</sup> 29 C.F.R. § 825.306(a)(3).

<sup>210</sup> *Family and Medical Leave Act*, U.S. DEP'T OF LABOR, <https://webapps.dol.gov/elaws/whd/fmla/10c9.aspx> (last visited Jan. 1, 2022). See also *Raytheon v. Hernandez*, 540 U.S. 44, 46 (2003) (holding that an employee was lawfully terminated due to an unwritten workplace policy prohibiting the employment of any individual who violates any workplace rule).

<sup>211</sup> See *supra* note 181-89 and accompanying text.

<sup>212</sup> 370 U.S. 660 (1962).

<sup>213</sup> *Id.* at 667.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 667-68.

addiction, then the insane can also be punished for their insanity.”<sup>216</sup> He also stated that addiction has an effect on the community and may lead to punitive measures when they “relate to acts of transgression.”<sup>217</sup> However, being an addict should not be punished as a crime.<sup>218</sup> Yet, this is the end result under the current structure of the A.D.A. since an individuals can be terminated from employment if they request an accommodation from their employer to seek rehabilitative treatment.<sup>219</sup> The employees in such a case would face adverse employment action and potentially lose their source of income simply because they have a disability<sup>220</sup>; and after all, Congress should not pass a law that punishes someone due to a disability.<sup>221</sup>

The Court in *Robinson* noted that an addict is a sick person and may be confined for treatment or for the protection of society.<sup>222</sup> Under the A.D.A., addicts who wish to seek treatment to remedy and gain control over the disability is barred from making this request to their employer. This is because no employment protection is afforded to them and the threat of losing their job always remains. If Congress intended to help those suffering from a disability, such as addiction, it would unequivocally grant those afflicted individuals employment protection while they seek treatment to address the circumstances that inflame their disease.

If Congress is unable to distinguish individuals whose addiction stemmed from lawful use of a drug from those who became addicted due to unlawful use, it should grant individuals with a substance use disorder the same employment protection given to those with an alcohol use disorder. There is no issue when deciding if an alcoholic should be afforded employment protection when seeking treatment for their alcoholism because alcohol is a legal substance.<sup>223</sup> Eliminating the A.D.A.’s legality distinction will result in the same

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<sup>216</sup> *Id.* at 674.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* (Douglas, J., concurring) (“But I do not see how under our system being an addict can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.”).

<sup>219</sup> *See* 42 U.S.C. § 12114.

<sup>220</sup> *See* Hartney, *supra* note 149 (explaining that addiction is classified as a disability under the DSM-V).

<sup>221</sup> *See* *Robinson v. California*, 370 U.S. at 674-75.

<sup>222</sup> *Id.* at 676.

<sup>223</sup> *See* 42 U.S.C. § 12114.

level of inclusiveness provided to individuals with alcohol use disorders. Thus, the A.D.A. must be revised to draw distinctions that do not encompass an illness as a culpable criterion.

**C. Solution: Apply Intermediate Scrutiny to the A.D.A.**

The issues that lie within the A.D.A. as it relates to the purported protections for disabled individuals are so extensive that addressing each at the statutory level will likely prove difficult, if not unsuccessful. The appropriate remedy to further the intent of the A.D.A. and eliminate systemic discrimination of disabled individuals is to raise the standard of review from rational basis to intermediate scrutiny.<sup>224</sup> By doing so, affirmative action plans, such as Social Security, have an increased chance of surviving when compared to a strict scrutiny analysis.<sup>225</sup> Similarly, raising the level of scrutiny will prevent unreasonable legislation. An example of the flaw in rational basis comes from the decision in *Kotch v. Board of River Port Pilot Commissioners for Port of New Orleans*,<sup>226</sup> where the court upheld a hiring process which allowed nepotism because the legislature “*might*” have intended so.<sup>227</sup> Furthermore, employing this standard will likely protect disabled individuals from the unwarranted grant of discretion given to employers in their decision to hire or fire a disabled employee based on the employer’s “reasonable belief” that someone is a “current user.”<sup>228</sup> Last, an employer who terminates an employee due to

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<sup>224</sup> See *id.* § 12101(b). The purpose of the A.D.A. is

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

*Id.*

<sup>225</sup> See *supra* notes 60-77 and accompanying text.

<sup>226</sup> 209 La. 737 (1946), *aff’d*, 330 U.S. 553 (1947)

<sup>227</sup> *Kotch v. Bd. of River Port Pilot Cm’rs for New Orleans*, 209 La. 737, 763 (1946), *aff’d*, 330 U.S. 553, 564 (1947) (emphasis added).

<sup>228</sup> See *Mauerhan v. Wagner Corporation*, 649 F.3d 1180, 1187 (10th Cir. 2011) (granting an employer the power to decide if the employee’s illicit substance use was

violating one workplace rule that prohibits the employment of an individual who tests positive on a drug test will likely be found to disparately impact the employee and be declared unconstitutional under an intermediate scrutiny analysis.<sup>229</sup>

If the level is raised from rational basis to intermediate scrutiny, courts will have the power to examine any instances of previous discrimination and determine if a proposed rule or regulation furthers an important government interest by means that are substantially related to that interest.<sup>230</sup> Significantly, Congress stated that “society has tended to isolated individuals with disabilities”<sup>231</sup> and the “continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . for which our free society is justifiably famous . . . .”<sup>232</sup> Also, recall that factors considered when determining if a particular group is entitled to review under intermediate scrutiny include the immutability of the common trait and the inability to change such characteristic or trait.<sup>233</sup> Notably, individuals born with low levels of the MAO-A gene are genetically predisposed to suffering from addiction. Plainly stated, individuals are born with disability; however, this is due to no fault of their own, but instead their condition comes from several factors, including environment, genetics, and experiences. All of these factors have the potential to “activate” their addiction. However, their “immutable” genetics have failed to qualify for this level of protection. If courts utilized an intermediate standard, legislation that appears neutral on its face but is discriminatory in its application can be invalidated through judicial decisions.

Thus, raising the level of scrutiny to intermediate would be a significant step towards equality in the workplace as it has the power

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recent enough to deem the employee a “current user,” which in turn, removes all protections afforded by the A.D.A.). *See also* 42 U.S.C. § 12114(a) (granting employment protections for former illicit substance users but excluding the same protections for “current” illicit substance users).

<sup>229</sup> *See* Raytheon v. Hernandez, 540 U.S. 44, 46 (2003).

<sup>230</sup> *See* Danskine v. Miami Dade Fire Dept., 253 F.3d 1288, 1293-94 (11th Cir. 2001).

<sup>231</sup> 42 U.S.C. § 12101(a)(2).

<sup>232</sup> *Id.* § 12101(a)(8).

<sup>233</sup> *Frontiero v. Richardson*, 411 U.S. 677, 677-78 (1973).

to address any potential “outright” exclusion from employment consideration.<sup>234</sup>

## VI. CONCLUSION

There are a number of views when it comes to drug use; some believe it is a conscious decision one makes due to the lack of a moral compass, while others know that there is scientific research proving that there are other factors at play beyond the users’ control.<sup>235</sup> The current structure of the A.D.A. grants protection to individuals currently struggling with certain substance use disorders simply because the substances are legal.<sup>236</sup>

This arbitrary line is drawn in the sand without consideration of scientific evidence.<sup>237</sup> However, a distinction is being made about what qualifies for protection based on whether the disability is the result of an “illegal” or “legal” activity.<sup>238</sup> The effects of alcohol use disorders and illicit substance use disorders are essentially indistinguishable.<sup>239</sup> Moreover, the DSM-V does not draw a distinction between legal substances, such as alcohol, and illegal substances; instead, both types of disorders are diagnosed using the same eleven-point scale due to their shared adverse effects.<sup>240</sup>

Moreover, legal substances, like alcohol, are far more dangerous than stigmatized substances, like marijuana.<sup>241</sup> At the same

<sup>234</sup> See *supra* notes 95-97 and accompanying text. See also 42 U.S.C. § 12101(a)(4) (acknowledging that individuals with disabilities are unfairly discriminated against and have “no legal recourse to redress such discrimination”).

<sup>235</sup> See generally *Drugs, Brains, and Behavior: The Science of Addiction*, NAT’L INST. DRUG ABUSE (July 2020), <https://www.drugabuse.gov/sites/default/files/soa.pdf> (discussing the short- and long-term effects drug use has on the brain and body).

<sup>236</sup> See generally 42 U.S.C. § 12114.

<sup>237</sup> See *Alcohol Alert: Alcohol and Other Drugs*, NAT’L INST. ALCOHOL ABUSE & ALCOHOLISM (July 2008), <https://pubs.niaaa.nih.gov/publications/aa76/AA76.pdf> (discussing how alcohol and drug dependence are intertwined).

<sup>238</sup> See generally 42 U.S.C. § 12114(b).

<sup>239</sup> Hartney, *supra* note 149.

<sup>240</sup> *Id.*

<sup>241</sup> Honor Whiteman, *Alcohol ‘More Damaging to Brain Health than Marijuana’*, MED. NEWS TODAY (Feb. 12, 2018), <https://www.medicalnewstoday.com/articles/320895>; Jena Hilliard, *New Research Exposes the 15 Most Dangerous Drugs*, ADDICTION CTR. (Aug. 18, 2019), <https://www.addictioncenter.com/news/2019/08/15-most-dangerous-drugs> (listing alcohol as the third most dangerous drug and omitting marijuana from the list).

time, a person currently struggling with alcohol use disorder will be afforded protection under the A.D.A., but not marijuana, because alcohol is a legal substance.<sup>242</sup> A study conducted in 2010 examined how harmful different substances were based on sixteen criteria,<sup>243</sup> all of which focused on how they affect the individual user and society as a whole.<sup>244</sup> This study found that alcohol was the most dangerous drug when measuring its harm to others, and it was the fourth most dangerous when examining the harm to the user.<sup>245</sup> Thus, a legal substance, such as alcohol, has a high potential to negatively affect the user and others; yet, alcohol abusers are afforded protection under the A.D.A., while abusers of other, less harmful substances are not simply due to an arbitrary classification.<sup>246</sup>

Congress understood that individuals with physical or mental disabilities have been historically discriminated against.<sup>247</sup> Therefore, in an effort to grant this class a “legal recourse to redress such discrimination,” Congress adopted the A.D.A.<sup>248</sup> However, the federal government is falling behind the states when it comes to revising certain laws based on the modern understanding about addiction and its effects. While states deliberate about establishing which substances are legal and illegal, certain individuals with disabilities will face permanent barriers to achieving equal opportunities under the A.D.A.

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<sup>242</sup> Christopher Ingraham, *Americans Finally Understand that Marijuana is Less Harmful than Alcohol*, WAH. POST (Apr. 2, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/04/02/americans-finally-understand-that-marijuana-is-less-harmful-than-alcohol>.

<sup>243</sup> *Alcohol Most Harmful Drug Based on Multicriteria Analysis*, IMPERIAL COLL. LONDON (Nov. 1, 2010), <https://www.imperial.ac.uk/news/94042/alcohol-most-harmful-drug-based-multicriteria>.

The nine categories in harm to self are drug-specific mortality, drug-related mortality, drug-specific damage, drug-related damage, dependence, drug-specific impairment of mental function, drug-related impairment of mental functioning, loss of tangibles, loss of relationships, and injury. The harm to others categories are crime, environmental damage, family conflict, international damage, economic cost, and decline in community cohesion.

*Id.*

<sup>244</sup> *Id.* The substances examined were alcohol, cannabis, heroin, crack cocaine, tobacco, cocaine, methamphetamine, ecstasy, buprenorphine, benzodiazepines, amphetamine, GHB, LSD, methadone, steroids, and mushrooms. *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> See 42 U.S.C. § 12102(b).

<sup>247</sup> See *id.* § 12101(a).

<sup>248</sup> *Id.* § 12101(a)(4).



until the federal government revises this act to include protections for individuals currently battling illicit substance use disorders. Congress's decision to separate individuals into two categories based on whether their disease is the result of an illegal or legal substance is an improper distinction to make and must be addressed. Furthermore, it has been argued that the structure of the A.D.A. only serves to deter "some individuals from getting into treatment and driv[es] the problem underground in an effort to hide that problem from an employer."<sup>249</sup> This is a valid point because individuals are forced to make a choice: (1) either disclose their substance abuse and risk losing their source of income or (2) try to achieve sobriety on their own. However, there is a way to remedy this catch-22: increase the standard of review of A.D.A. claims to intermediate scrutiny. This will afford the requisite protections to individuals suffering from illicit substance abuse necessary to further the A.D.A.'s goal of "eliminat[ing] discrimination against individuals with disabilities."<sup>250</sup>

In sum, the level of scrutiny applied to the A.D.A. must be elevated to intermediate scrutiny because applying a rational basis analysis inherently discriminates against certain individuals based on their substance of choice, thereby favoring one person's life over another's simply because they chose an "acceptable" addiction.

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<sup>249</sup> *Sharing the Dream: Is the ADA Accommodating at All?*, U.S. COMM'N ON CIVIL RIGHTS, <https://www.usccr.gov/pubs/ada/ch4.htm> (last visited Feb. 28, 2021).

<sup>250</sup> 42 U.S.C. § 12101(b)(1).