Long COVID and Temporary Conditions as Disabilities Under the ADA

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I. INTRODUCTION

COVID-19 is a highly contagious disease caused by the novel coronavirus SARS-CoV-2. The symptoms range from mild to severe, and can even be fatal.[1] As of June 2022, there have been over 85.6 million confirmed cases of COVID-19 in the United States since the first reported cases in February 2020.[2] The Centers for Disease Control and Prevention has identified that, while most people who catch COVID-19 are better within a few weeks, some people experience post-infection conditions known as "long COVID."[3] The CDC defines long COVID as "a wide range of new, returning, or ongoing health problems" people can experience four or more weeks after first being infected.[4] These health problems, such as fatigue, respiratory, and heart issues, can persist for weeks or months after initial infection with the virus.[5]

In July 2021, the U.S. Department of Justice (DOJ) and the U.S. Department of Health and Human Services (HHS) jointly issued guidance classifying long COVID as a potential disability under the Americans with Disabilities Act of 1990 (ADA).[6] To qualify as a disability under the ADA, a condition must be a "physical or mental impairment that

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[1] *Long COVID or Post-COVID Conditions*, CTRS. FOR DISEASE CONTROL PREVENTION (Sept. 1, 2022), https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html [https://perma.cc/AMM9-UDKQ].

[2] *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL PREVENTION (June 15, 2022), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days [https://perma.cc/62WS-9K4G].

[3] *Long COVID or Post-COVID Conditions*, *supra* note 1.

[4] *Long COVID or Post-COVID Conditions*, *supra* note 1.

[5] *Long COVID or Post-COVID Conditions*, *supra* note 1.

[6] 42 U.S.C. § 12101–12213.

substantially limits one or more of the major life activities of [an] individual."[7] The guidance characterizes long COVID as a "physical impairment" that can "substantially limit one or more major life activities" due to the possible long-term or returning effects on various body systems and symptoms such as lung damage, heart damage, and even mental health conditions resulting from COVID-19 infection.[8]

The issuance of this guidance implicates larger unresolved questions surrounding the application of the ADA to temporary, non-chronic conditions. The guidance relies on regulations from the Equal Employment Opportunity Commission (EEOC), the agency statutorily authorized by the ADA Amendment Act of 2008 (ADAAA)[9] to interpret the ADA. Current EEOC regulations state that temporary impairments are not automatically disqualified as disabilities under the ADA, despite being non-permanent conditions.[10] These regulations were promulgated in response to the ADAAA. Prior to the ADAAA, U.S. Supreme Court decisions and EEOC regulations narrowed the definition of "disability" to exclude temporary and non-chronic conditions.[11] Congress passed the ADAAA in response to these limitations, rejecting such a narrow reading of "disability" and expressing its intent for the ADA to afford broader coverage.[12] In light of Congress's express intent, the EEOC provided that temporary conditions may still qualify as disabilities. However, questions of judicial deference arise when agencies interpret statutes and issue guidance and regulations pursuant to legislation.

Considering the commonality with which long COVID occurs (estimates of COVID-19 patients experiencing long COVID range from around one-third[13] to over half[14]), it is likely the prevalence of the disease will result in much litigation, including many claims for ADA coverage. Indeed, a few individuals with long COVID have already started

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[7] *Id.* at § 12102(1)(A).

[8] U.S. DEP'T HEALTH & HUMAN SERVS., U.S. DEP'T OF JUST., GUIDANCE ON "LONG COVID" AS A DISABILITY UNDER THE ADA, SECTION 504, AND SECTION 1557 (2021), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html#footnote11_l74a430 [https://perma.cc/KPH3-T5HZ].

[9] *See* Pub. L. No. 110-325, § 4(a), 122 Stat. 3553 (amending 42 U.S.C. § 12102(3)).

[10] *See* 29 C.F.R. § 1630.2(j)(1)(i) (2011).

[11] *See* Sutton v. United Air Lines, 527 U.S. 471 (1999); *see also* Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184 (2002).

[12] *See* ADA Amendments Act of 2008 § 4(a).

[13] *Post-Acute Sequelae of SARS-CoV-2 Infection Among Adults Aged ≥18 Years — Long Beach, California, April 1–December 10, 2020*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 17, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7037a2.htm?s_cid=mm7037a2_x [https://perma.cc/H7FX-KLKJ].

[14] Tracy Cox, *How Many People Get 'Long COVID?' More Than Half, Researchers Find*, PA. STATE UNIV. (Oct. 13, 2021), https://www.psu.edu/news/research/story/how-many-people-get-long-covid-more-half-researchers-find/ [https://perma.cc/KG5M-DNXE].

filing cases in district courts.[15] Open questions remain regarding both how courts will treat ADA claims stemming from long COVID generally and the judicial deference given to the EEOC's long COVID regulations and the resulting joint agency guidance.

This Comment will address those questions. This Comment proceeds in Part II by outlining the underlying legal landscape and establishing the uncertain state of the law surrounding how courts treat temporary and non-chronic conditions in ADA claims. Currently within this body of law, an unresolved circuit split exists between the Third and Fourth Circuits as to whether such conditions are covered, despite new EEOC regulations which explicitly state that, if severe enough, temporary conditions may qualify. The Fourth Circuit line of cases, which has been followed by the Ninth Circuit, has upheld these regulations. In contrast, the Third Circuit line, relying on outdated, pre-ADAAA precedent rather than current EEOC regulations, has ruled that temporary conditions are not covered. Part III.A of this Comment argues that this split should be resolved in favor of the EEOC as a result of *Chevron* deference, which is proper when accounting for Congress's intent in passing the ADAAA. Next, Part III.B argues that even absent *Chevron*'s directive of deference, courts should still defer to the EEOC's interpretation of the ADA, as the agency acts on direct authority from Congress. Part III.C asserts that the recent guidance regarding long COVID as a disability not only relies on valid and reasonable EEOC regulations but warrants *Skidmore* deference itself due to relevant policy expertise of the issuing agencies, noting that circuit courts and lower courts have already given effect to this logic. Finally, specifically applicable to the concerns arising from the COVID-19 pandemic, this Comment argues that deferring to the EEOC and giving effect to this guidance will help address issues of distributive justice related to disability accommodations. Addressing these issues furthers the ADA's ultimate purpose of acting as an equalizing force for a disadvantaged population.

II. FOUNDATIONS: UNDERLYING LAW & THE COVID-19 PANDEMIC

A. The Americans with Disabilities Act

The Americans with Disabilities Act, a civil rights law enacted in 1990, prohibits discrimination against Americans on the basis of disability.[16] The ADA defines a "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being

[15] *See* Complaint, Probert v. Mubea, No. 4:21-CV-11660 (E.D. Mich July 16, 2021).

[16] 42 U.S.C. § 12101(b).

regarded as having such an impairment."[17] As provided in the ADA, the "major life activities" referenced in subsection (A) above include a wide range of abilities, such as "performing manual tasks," "standing," "speaking," and "working."[18] The regulatory authority of the ADA is split between a number of agencies. The EEOC may issue regulations to carry out the ADA's employment provisions, the Attorney General its public services provisions, and the Secretary of Transportation its transportation provisions.[19] However, in its original form, the ADA furnished no particular agency with regulatory authority to interpret and implement generally applicable provisions, including its definitions.[20]

In the absence of congressionally authorized agency interpretation, the U.S. Supreme Court initially interpreted the provisions of the ADA with reference to regulations promulgated by HHS implementing the Rehabilitation Act of 1973.[21] The Court's first ADA decision, *Bragdon v. Abbott*,[22] openly relied on the interpretations of the Rehabilitation Act within HHS's regulations when determining whether HIV constituted a "disability."[23] Noting that the definition of "disability" in the ADA was drawn "almost verbatim" from the Rehabilitation Act's definition of "handicapped individual," the Court inferred an "implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations" from the Department of Health and Human Services.[24] *Bragdon* established a three-step inquiry to determine whether an individual's condition qualifies as a disability under the subsection (A) definition of "disability" (known as the "actual disability" provision). The inquiry operates under the assumption that the ADA affords "at least as much protection as provided by the regulations implementing the Rehabilitation Act."[25] Under *Bragdon*, to qualify as having an "actual disability," an individual must (1) have a physical or mental impairment, which (2) limits a major life activity (3) substantially.[26]

In subsequent cases, the Court refined these requirements. In *Sutton v. United Air Lines*,[27] the Court ruled that when determining whether an individual has a disability, the decision must be made in

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[17] 42 U.S.C. § 12102(1).

[18] *Id.* at § 12102(2)(A).

[19] *Id.* at §§ 12117, 12134, 12149, 12164 (granting authority to various agencies).

[20] *See* Sutton v. United Air Lines, 527 U.S. 471, 479 (1999).

[21] Pub. L. No. 93-112, 87 Stat. 355.

[22] 524 U.S. 624 (1998).

[23] *Id.* at 628, 631–32.

[24] *Id.* at 631–32.

[25] *Id.*

[26] *Id.* at 631. Although informed by regulations implementing the Rehabilitation Act, the *Bragdon* approach to ADA applicability is still used by courts today.

[27] 527 U.S. 471 (1999).

consideration with the availability of corrective or mitigating measures.[28] The plaintiffs in *Sutton*, both airline pilots, had severe visual impairments and failed to meet the minimum vision requirement for United Airlines pilots, resulting in United terminating their job interviews and denying them the position.[29] The Court found that the plaintiffs failed to establish a disability because, with the use of available corrective or mitigating measures (such as contacts or eyeglasses), plaintiffs could have functioned as if they were not impaired.[30]

Rather than relying on regulations interpreting the Rehabilitation Act, the *Sutton* Court engaged with guidelines issued by the EEOC that interpreted the ADA, despite the agency's lack of statutory authorization to do so.[31] The EEOC guidance existing at that time stated that lacking the ability to do one specific job did not constitute a substantial limitation on the major life activity of "working." The Court relied on this guidance to deny the plaintiffs assertion they were "substantially limited."[32] However, despite deferring to the EEOC's judgment on what it means to be "substantially limited" in working, the Court found the EEOC's reading of the ADA "impermissible" when it came to evaluating impairments without reference to mitigating measures.[33] The Court asserted that the availability of corrective devices such as glasses should considered in determining whether a disability exists, dismissing the EEOC's contrary interpretation.[34]

Later, in *Toyota Motor Manufacturing, Kentucky v. Williams*,[35] the Court further narrowed the definition of "disability."[36] The plaintiff in *Toyota Motor* suffered injuries in her hands, wrists, and arms from repetitive work she performed on an assembly line and was eventually declared by her physician to be unable to perform manual tasks.[37] The Court held that in bringing an ADA claim, plaintiffs must show that the activities they are unable to perform are tasks of "central importance" to daily life, not simply "major" life tasks.[38] Since the *Toyota Motor* plaintiff could still carry out tasks of "central importance" despite being

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[28] *Id.* at 472; *see also* Murphy v. United Postal Service, 527 U.S. 516 (1999).

[29] *Sutton*, 527 U.S. at 476.

[30] *Id.* at 475; *see also* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 (1999) (requiring the limitation of daily life activities to be "substantial").

[31] *See* Sutton, 527 U.S. at 479.

[32] *Id.* at 493.

[33] *Id.* at 482.

[34] *Id.*

[35] 534 U.S. 184 (2002).

[36] *See id.* at 184.

[37] *Id.* at 187.

[38] *Id.* at 202.

unable to accomplish essential tasks at work, her claim was dismissed.[39] Additionally, the Court remarked that an individual's disability must be "permanent or long-term" in order for that individual to qualify for coverage under the ADA.[40]

Here, again, the Court referenced regulations promulgated by the EEOC interpreting the ADA as well as the HHS regulations interpreting the Rehabilitation Act it relied upon in *Bragdon* (discussion of which was absent from the Court's opinion in *Sutton*). In *Toyota Motor*, the Court purported to fill a gap left in the silence of the EEOC's regulations on the issue of what a plaintiff must demonstrate to show substantial limitation.[41] The Court suggested, however, that the EEOC regulations nevertheless carried weight. Justice O'Connor refers to what the EEOC regulation "instructs" courts to consider with regard to substantial limitation,[42] implicitly recognizing the EEOC's authority to speak on the matter.

B. The ADA Amendments Act

While the Court's three-prong approach in *Bragdon* remains the operative test for ADA eligibility under the "actual disability" subsection, Congress went on to explicitly reject the limited interpretation of "disability" the Court developed through *Sutton* and *Toyota Motor*. In response to these decisions and to the EEOC regulations upon which they relied (which strictly limited ADA coverage to permanent conditions that may not be mitigated), Congress passed the ADA Amendments Act in 2008,[43] containing new rules of construction regarding the definition of "disability" under the ADA.[44]

Congress concluded that the Court's standards set forth in *Sutton* and *Toyota Motor* were too rigid, resulting in many substantially limiting impairments left unprotected by the ADA contrary to Congress's intent. Congress announced that after "the Court's decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual's impairment did not constitute a disability;" as a result, in "many cases, courts would never reach the question whether discrimination had occurred."[45] The

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[39] *Id.*

[40] *Id.* at 198.

[41] *Id.* at 196.

[42] *Id.*

[43] Pub. L. No. 110-325, 122 Stat. 3553.

[44] *See* 42 U.S.C. § 12102(4)(a).

[45] 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers) [hereinafter Statement of the Managers].

ADAAA thus clarified that the "definition of disability . . . shall be construed in favor of broad coverage of individuals . . . to the maximum extent" in accordance with the findings and purposes of the ADA.[46] The "findings and purposes" Congress sought to uphold include assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" to those individuals with disabilities which "society has tended to isolate and segregate."[47] Along with this statement of purpose, Congress further broadened the scope of the original ADA by supplying that a condition that is only "episodic or in remission" can nevertheless qualify as a disability "if it would substantially limit a major life activity when active."[48]

Prior to the ADAAA, a temporary impairment almost never qualified as a disability under the ADA.[49] Before being statutorily authorized to interpret ADA definitions, the EEOC issued "interpretive guidance" stating that impairments that were short-term, non-chronic, and without long-term or permanent impacts were "usually not disabilities" under the "substantially" limiting requirement.[50] These regulations included a list of conditions as examples of impairments not meeting the threshold of "substantial" limitation to qualify as disabilities. [51] The EEOC included "influenza" as one such example.[52] As evidenced in *Sutton* and *Toyota Motor*, the Court found these to be reasonable interpretations of the ADA's definitions, despite the EEOC lacking authority at the time to interpret the ADA.

Upon the ADAAA becoming effective in 2009, Congress granted regulatory authority to the enforcing agencies—the EEOC, the Attorney General, and the Secretary of Transportation—to "issue regulations implementing the definitions of disability in section 3 . . . and the definitions in section 4."[53] Subsequently, the EEOC promulgated post-ADAAA regulations consistent with § 553 of the Administrative Procedure Act ("APA"),[54] or the "notice-and-comment" provisions.[55] The

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[46] 42 U.S.C. § 12102(4)(a). The ADAAA provides that Congress intended that the ADA "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage. 42 U.S.C. § 12101(b)(1).

[47] *Id.* at § 12101(a)(2), (7).

[48] *Id.* at § 12102(4)(D).

[49] Nathaniel P. Levy, Note, *You're Fired, but Get Well Soon: Temporary Impairments as ADA Disabilities in Employment Cases*, 54 WILLAMETTE L. REV. 547, 551 (2018).

[50] 29 C.F.R. § 1630.2(j) (1998).

[51] *Id.*

[52] *Id.*

[53] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(a), 122 Stat. 3553, 3557 (2008).

[54] 5 U.S.C. §§ 500–57.

[55] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,979 (Mar. 25, 2011) (codified in 29 C.F.R. § 1630).

EEOC drafted a Notice of Proposed Rulemaking ("NPRM") and provided the public sixty days to comment on the proposed regulation.[56] After considering over six-hundred public comments, the EEOC promulgated its revised interpretation of the ADA.[57]

The new EEOC regulations extensively modified the section within the ADA defining "substantially limits." Congress removed the limiting requirements articulated by the Court in *Sutton* and *Toyota Motor*; instead, the regulations state that the "substantially limits" standard is not meant to be demanding and should be "construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA."[58] The EEOC also removed the provided list of non-chronic, temporary conditions that previously did *not* qualify as disabilities under the ADA (such as influenza).[59] In fact, the EEOC explicitly specified that "an impairment lasting or expected to last fewer than six months can be substantially limiting," broadening the ADA's coverage to temporary disabilities if they are sufficiently severe.[60] This addition filled in a gap left by the ADA itself, which did not itself explicitly specify a durational requirement for a disability.[61]

Additionally, Congress broadened the threshold of what qualifies as a limitation. The ADAAA provided that "major bodily functions" fell under the "major life activities" that qualify a condition as a disability, if substantially limited.[62] These "major bodily functions" include the involuntary operation of entire organ systems, such as "functions of the immune system" and "respiratory" functions.[63] Thus, under the ADA as revised by the ADAAA, a temporary condition which substantially impacts the function of the body, not just certain voluntary activities, may qualify as a disability.

C. Circuit Split

Even since the promulgation of the new EEOC regulations, some courts have continued to deny ADA coverage to conditions that are temporary and non-chronic. Specifically, courts in the Third Circuit have maintained that where an individual's condition is temporary, even if the condition lasts several months, that individual is not covered by the

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[56] *Id.* at 16,978.

[57] *Id.* at 16,979.

[58] 29 C.F.R. § 1630.2(j)(1)(i) (2011).

[59] *Compare id. with* 29 C.F.R. § 1630.2(j) (1991).

[60] 29 C.F.R. § 1630.2(j)(1)(ix) (2011).

[61] *See* 42 U.S.C. § 12102.

[62] *Id.* at § 12102(2)(B).

[63] *Id.*

ADA.[64] Courts in the Third Circuit cite *Rinehimer v. Cemcolift*[65] to support denying coverage to individuals with temporary or non-chronic disabilities. The plaintiff in *Rinehimer*, who worked for an elevator manufacturer as a foreman, caught pneumonia and experienced temporary shortness of breath, which substantially limited his ability to work around dust and fumes.[66] His employer informed him he could not return to his job position and terminated his employment.[67] In analyzing his ADA claim, the court denied recognizing pneumonia as a disability despite its substantially limiting effect on the plaintiff's breathing solely because the condition was temporary.[68]

Third Circuit Courts have continued to follow *Rinehimer* in denying coverage to plaintiffs with temporary disabilities[69] as recently as December 2021.[70] This comes over a decade after the EEOC promulgated its revised regulations stating that temporary conditions are *not* disqualified under the ADA, yet courts in the Third Circuit have disregarded this interpretation. Additionally, the *Rinehimer* court dismissed plaintiff's claim regarding his pneumonia by relying only upon *McDonald v. Pennsylvania, Department of Public Welfare, Polk Center*,[71] another Third Circuit case.

The *McDonald* plaintiff sued her employer under the ADA after being terminated, alleging discriminatory termination due to her inability to work for two months after surgery.[72] Like the U.S. Supreme Court in *Bragdon*, the Third Circuit in *McDonald* relied on Rehabilitation Act regulations issued by HHS and caselaw surrounding those definitions to inform its application of the ADA.[73] The court also used the earlier EEOC interpretation of "disability" as excluding temporary conditions in dismissing the plaintiff's claim.[74] The *McDonald* court supplemented

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[64] *See, e.g.*, Macfarlan v. Ivy Hill SNF, LLC, 675 F.3d 266 (3d Cir. 2012); Sampson v. Methacton Sch. Dist., 88 F. Supp. 3d 422 (E.D. Pa. 2015); Long v. Spalding Auto. Inc., 337 F. Supp. 3d 485 (E.D. Pa. 2018).

[65] 292 F.3d 375 (3d Cir. 2002).

[66] *Id.* at 378–79.

[67] *Id.* at 379.

[68] *Id.* at 380.

[69] *See* Gardner v. SEPTA, 410 F. Supp. 3d 723 (E.D. Pa. 2019), *aff'd*, 824 F. App'x 100 (3d Cir. 2020) (denying ADA coverage to a plaintiff who suffered from a temporary impairment caused by a vehicle accident).

[70] *See* Raymo v. Civitas Media LLC, No. 3:19-CV-01798, 2021 WL 6197741 (M.D. Pa. Dec. 31, 2021) (granting summary judgment in favor of defendant employer on an ADA discrimination claim due in part to the "temporary nature" of plaintiff's disability).

[71] 62 F.3d 92 (3d Cir. 1995).

[72] *Id.* at 93.

[73] For example, the *McDonald* court cited Evans v. City of Dallas, 861 F.2d 846 (5th Cir. 1988), which held that a worker discharged after a knee injury that required surgery was not "disabled" within the meaning of the Rehabilitation Act because the condition was not permanent. *Id.* at 95.

[74] *McDonald*, 62 F.3d at 95.

its analysis with pieces of legislative history, specifically the Report of the Senate Committee on Labor and Human Resources, which stated that those "with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity."[75] Being decided in 1995, *McDonald* predates the ADAAA and the EEOC regulations. However, in relying on solely *McDonald* in coming to its decision, the *Rinehimer* court made no mention of the ADAAA nor the EEOC's updated regulations in its decision.[76]

By contrast, the Fourth Circuit in *Summers v. Altarum Institute, Corp.*[77] recognized the legal effect of the new EEOC regulations characterizing temporary conditions as disabilities.[78] Summers, the plaintiff, broke his leg and was told he would be unable to walk normally for at least seven months.[79] He then brought a claim against his employer under the ADA alleging unlawful termination based on his disability, which was dismissed with prejudice due to the temporary nature of his disability.[80] Summers appealed the dismissal. While a broken leg used to be the quintessential example of a temporary impairment *not* covered by the ADA,[81] the *Summers* court ruled that the plaintiff was indeed entitled to accommodations under the ADA.[82] In upholding Summers' disability, the Fourth Circuit made explicit reference to the ADAAA and subsequent EEOC regulations. The court referenced Congress's intent in enacting the ADAAA to expand the coverage of the ADA beyond the restrictive limits that had been placed upon it, rather intending the ADA to apply broadly.[83] The EEOC regulations cited by the court specifically provide that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" for purposes of proving an actual disability.[84] The court determined that duration was just one factor in determining whether a disability existed; if an

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[75] S. Rep. No. 101-116, (1989); *see also* H.R. Rep. No. 101-485(II), 50–52, 55 (1990).

[76] Discussion of the ADAAA and the new EEOC regulations are also conspicuously absent from the parties' briefs. The brief for appellee Cemcolift makes no mention of them, plainly stating that the ADA "requires that an employee show that his disability was of a permanent nature," citing *McDonald*. Brief for Appellee at 10, 13, Rinehimer v. Cemcolift, 292 F.3d 375 (3d Cir. 2002) (No. 01-1428), 2001 WL 34117936, at *10, *13. The brief for appellant Rinehimer also contains no mention of the updated definitions, nor argument that the non-permanent nature of Rinehimer's condition did not preclude him from ADA coverage. *See* Brief for Appellant, Rinehimer v. Cemcolift, 292 F.3d 375 (3d Cir. 2002), 2002 WL 32463429.

[77] 740 F.3d 325 (4th Cir. 2014).

[78] *Id.* at 330.

[79] *Id.* at 327.

[80] *Id.* at 328.

[81] *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995) ("Intermittent, episodic impairments are not disabilities, the standard example being a broken leg.").

[82] *Summers*, 740 F.3d at 333.

[83] *Id.* at 330.

[84] *Id.* (citing 29 C.F.R. § 1630.2(j)(1)(ix) (2011)).

individual was sufficiently physically impaired, that individual has a disability notwithstanding whether it is permanent.[85]

The previous approach to temporary, non-chronic conditions followed by *Rinehimer*, along with *Summers*'s departure from the narrow pre-ADAAA interpretation of the statutory language, has resulted in a circuit split. The Third and Fourth Circuits split on the issue of coverage of temporary and non-chronic conditions under the ADA, a tension which remains unresolved. This conflict could have significant implications for future application of the ADA, especially regarding ADA claims arising from long COVID cases that wind up ultimately being temporary. The question of whether courts are obliged to defer to the new EEOC regulations promulgated in light of the ADAAA, and therefore to give full effect to the guidance characterizing long COVID as a possible disability, turns on questions of judicial deference.

D. Judicial Deference

The proliferation of the administrative state has forced courts in recent decades to consider how much deference, if any, administrative interpretations of statutes should be afforded. A key tenet in administrative law holds that, where agencies are qualified or authorized to interpret a statute which that agency must enforce, courts should afford some level of deference.[86] In the early case of *Skidmore v. Swift & Co.*,[87] the Court held that agency pronouncements of policy and standards, including interpretations of statutory language, should be afforded respect to the extent that they are persuasive to the court.[88] Several factors may be considered in this determination, including the thoroughness of the agency's consideration, validity of reasoning, consistency of the guidance with earlier pronouncements of policy, and any other factors reflecting persuasiveness.[89] *Skidmore* reflects a sort of baseline-level standard of deference. It stands for the proposition that agency interpretations can be valuable reflections of specialized expertise, and, to the extent that they are reasonable and persuasive, that they should be respected even when not formally binding on courts.

In 1984, the Court again confronted how federal courts should regard agency interpretation of a statute that Congress authorized that agency to implement, imposing an alternative inquiry for determining judicial deference. In the seminal case *Chevron, U.S.A., Inc. v. Natural*

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[85] *See id.*

[86] *See generally* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

[87] 323 U.S. 134 (1944).

[88] *Id.* at 140.

[89] *Id.*

Resources Defense Council, Inc.,[90] the Court provided that if Congress directly and unambiguously spoke in the organic statute on the matter at hand, then Congress's word (as interpreted by the courts) controls.[91] However, if the statute is silent or ambiguous as to the question at hand, courts should defer to the interpretation of the agency authorized to implement the statute, as long as the agency's interpretation is reasonable.[92] This two-step inquiry became known as the *Chevron* doctrine, which was subsequently narrowed to apply to a limited set of circumstances. A *Chevron* analysis applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority;"[93] in other words, where an agency is "charged with administering" a federal statute.[94]

Thus, whether *Chevron* deference is appropriate relies on the specific agency interpreting the statute (which requires congressionally delegated authority), and the type of agency action (which must be rules carrying force of law). This preliminary inquiry has been designated as a kind of "*Chevron* Step-Zero."[95] The Court gave definition to this inquiry in *Christensen v. Harris County*,[96] dealing with interpretive guidance documents and answering what deference each type of document warrants. According to the Court, "*Chevron* deference does apply to an agency interpretation contained in a regulation," which is a rule with force of law, but interpretations "as those in opinion letters—like interpretations contained in policy statements . . . and enforcement guidelines, all of which lack the force of law," are afforded deference to the extent that they are persuasive; in other words, only *Skidmore*-type deference.[97] Thus, the Court narrowed *Chevron* to situations where regulations apply with "force of law."[98] Elsewhere, the less deferential *Skidmore* analysis applies.

Before the ADAAA, the Court repeatedly declined to determine the level of deference afforded to regulatory agencies in interpreting the ADA's definitions. This is likely due to the fact that the ADA originally did not provide such authority to any specific agency, failing "Step-Zero"

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[90] 467 U.S. 837 (1984).

[91] *Id.* at 842–43.

[92] *Id.* at 866.

[93] United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

[94] Smiley v. Citibank, 517 U.S. 735, 739 (1996).

[95] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

[96] 529 U.S. 576 (2000).

[97] *Id.* at 577.

[98] *Id.*

and never triggering a formal *Chevron* analysis.[99] The EEOC, newly authorized by the ADAAA to promulgate regulations implementing the ADA, issued its updated regulations after notice and comment, and *Summers* was the first appellate court decision granting *Chevron* deference to those regulations interpreting the definition of "disability" in the ADA.[100] The *Summers* court reasoned that the EEOC had been given express authority by Congress to interpret the ADA and had promulgated its new regulations in exercise of that authority, satisfying "*Chevron* Step-Zero."[101]

According to the Fourth Circuit in *Summers*, there was no evident intent by Congress, as Summers' employer contended, to withhold coverage under the ADA for temporary or non-chronic impairments. The court claimed that "at best" the statute was ambiguous on the question.[102] The Fourth Circuit further held that the EEOC's interpretation of the ADA as amended was reasonable. The court explained that "[t]he EEOC's decision to define disability to include severe temporary impairments entirely accords with the purpose" of the amended ADA as the "stated goal of the ADAAA is to expand the scope of protection available under the Act as broadly as the text permits."[103] As noted, the Third Circuit in *Rinehimer* made no mention of the EEOC regulations at all and thus did not engage in any similar *Chevron* analysis, nor provide an explanation for why the regulations should not be afforded deference.

E. COVID-19 Pandemic and "Long COVID" Guidance

In December 2019, a resident of Wuhan, China became the first known case of a highly contagious disease known as "COVID-19," which spread rapidly into a worldwide pandemic.[104] Since the discovery of the novel coronavirus, several waves and variants have turned COVID-19 into a global crisis, severely impacting the United States.[105] The disease and its variants cause a wide variety of symptoms ranging in intensity

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[99] *See* Jeremy Greenberg, *Not a "Second Class" Agency: Applying* Chevron *Step Zero to EEOC Interpretations of the ADA and ADAAA*, 24 GEO. MASON U. CIV. RTS. L.J. 297, 311–15 (2014) (discussing the Court's avoidance of stating which standard it applies); *see also Sutton*, 527 U.S. at 472 (declining to determine which level of deference to give regulatory agencies).

[100] Levy, *supra* note 49, at 558.

[101] Summers v. Altarum Inst. Corp., 740 F.3d 325, 332 (4th Cir. 2014).

[102] *Id.*

[103] *Id.*

[104] Jeremy Page et al., *In Hunt for Covid-19 Origin, Patient Zero Points to Second Wuhan Market*, WALL ST. J. (Feb. 26, 2021), https://www.wsj.com/articles/in-hunt-for-covid-19-origin-patient-zero-points-to-second-wuhan-market-11614335404 [https://perma.cc/SP96-69FU].

[105] *See* Paulina Villegas et al., *Biden, States and Other Nations Brace for Rush of Omicron Infections*, WASH. POST (Dec. 21, 2021), https://www.washingtonpost.com/nation/2021/12/21/covid-omicron-variant-live-updates/ [https://perma.cc/JC4V-ZNB6].

from mild to severe, and even fatal.[106] Among possible symptoms are flu-like symptoms, including fever, shortness of breath, fatigue, cough, and headache, but more serious symptoms include adverse effects to entire body systems or autoimmune conditions.[107]

The CDC has identified that, while most people who catch COVID-19 are better within a few weeks, in some cases people experience post-COVID conditions known as "long COVID."[108] The CDC defines long COVID as "a wide range of new, returning, or ongoing health problems that people experience . . . at least four weeks after infection."[109] Long COVID appears to be a condition impacting a substantial number of those infected with the virus. A September 2021 CDC study showed that approximately one-third of sampled COVID-19 patients reported persistent symptoms two months after their initial positive tests,[110] while an October 2021 study showed more than half of infected patients experience long COVID.[111]

There is scant caselaw regarding the applicability of the ADA to COVID-19, likely due to the novelty of the disease, though more litigation is arising. COVID-19 has the potential to create a sizeable population of those susceptible to COVID-19-related discrimination,[112] but existing caselaw surrounding coverage of COVID-19 as a disability so far has not led to a consensus. The Northern District of Alabama found that if an individual has an underlying condition that makes them particularly susceptible to a severe case of COVID-19, then ADA provisions apply; however, this case, and other similar cases, addresses the ADA with respect to prior conditions *worsened* by COVID-19, not to symptoms *caused* by COVID-19.[113] A case before the Eastern District of Pennsylvania held that mere exposure to COVID-19 did not constitute a disability, notwithstanding whether contracting COVID-19 itself qualified as a disability under the ADA. This again avoids the explicit question as to whether COVID-19 or its long-term effects constitute a disability.[114]

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[106] *Long COVID or Post-COVID Conditions*, *supra* note 1.

[107] *Long COVID or Post-COVID Conditions*, *supra* note 1; *Symptoms of COVID-19*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Mar. 22, 2022), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html [https://perma.cc/394A-G5VG].

[108] *Long COVID or Post-COVID Conditions*, *supra* note 1.

[109] *Long COVID or Post-COVID Conditions*, *supra* note 1.

[110] *Post-Acute Sequelae of SARS-CoV-2 Infection*, *supra* note 13.

[111] Cox, *supra* note 14.

[112] Frank Griffin, *Covid-19 and Public Accommodations Under the Americans with Disabilities Act: Getting Americans Safely Back to Restaurants, Theaters, Gyms, and "Normal"*, 65 ST. LOUIS U. L.J. 251 (2021) (noting that individuals that have been exposed, infected, or susceptible to COVID-19 may be subject to discrimination or lack of sufficient accommodations).

[113] People First of Alabama v. Merrill, 491 F. Supp. 3d 1076 (N.D. Ala. 2020).

[114] Parker v. Cenlar FSB, No. 20-02175, 2021 U.S. Dist. LEXIS 143, at *15 (E.D. Pa. Jan. 4,

A Michigan case was the first to confront the applicability of disability legislation to conditions arising from COVID-19. In *Probert v. Mubea, Inc.*,[115] the plaintiff brought a claim under Michigan Persons with Disabilities Civil Rights Act,[116] the Michigan state equivalent of the federal ADA.[117] The plaintiff claimed her employer failed to provide her with accommodations for her breathing issues related to her condition of long COVID.[118] The case was set for a jury trial in 2023[119] but was subsequently dismissed to proceed to mediation.[120] However, this litigation indicated that the profusion of long COVID-19 cases would spur more litigation and warrant examination of current standards of ADA applicability.

In fact, on July 26, 2021, the Department of Health and Human Services and the Department of Justice jointly issued guidance regarding coverage of individuals with long COVID under the ADA.[121] The guidance characterized long COVID as a "physical impairment" that can "substantially limit one or more major life activities," due to persisting symptoms and the possible long-term effects on various body systems.[122] These effects might include shortness of breath from lung damage, lingering gastrointestinal pains and nausea, and even limited brain function or concentration resulting from COVID-19 infection.[123] Further, the guidance notes that these "limitations do not need to be severe, permanent, or long-term."[124]

The issuance of this guidance could feasibly lead to many more ADA claims from individuals with long COVID and, in fact, has been relied upon by lower courts already, as discussed further in this Comment.[125] Given the recency of its discovery and lack of robust information surrounding COVID-19—and especially long COVID—courts

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2021).

[115] No. 4:21-CV-11660 (E.D. Mich. 2021).

[116] MICH. COMP. LAWS § 37.1101–37.2901.

[117] Although the cause of action in the case arose under state law, the court sat in diversity jurisdiction. Probert v. Mubea, Inc., No. 4:21-CV-11660 (E.D. Mich. 2022).

[118] *Id.*

[119] Case Management and Scheduling Order, Probert v. Mubea, Inc., No. 4:21-CV-11660 (E.D. Mich. 2022).

[120] Stipulated Order Dismissing Case, Probert v. Mubea, Inc., No. 4:21-CV-11660 (E.D. Mich. 2022).

[121] GUIDANCE ON "LONG COVID", *supra* note 8.

[122] GUIDANCE ON "LONG COVID", *supra* note 8.

[123] GUIDANCE ON "LONG COVID", *supra* note 8. The guidance also lists possible accommodations that might be necessary for individuals with long COVID, such as service animals to stabilize individuals who are too dizzy to stand on their own.

[124] GUIDANCE ON "LONG COVID", supra note 8.

[125] *See* Brown v. Roanoke Rehab. & Healthcare Ctr., No. 3:21-CV-00590-RAH, 2022 WL 532936 (M.D. Ala. Feb. 22, 2022).

may be uncertain as to how to handle these claims without such guidance. As the guidance notes, an individualized inquiry is always necessary for determining the applicability of the ADA to a condition, especially since long COVID itself varies in severity, duration, and symptoms.[126] However, the guidance appears to specifically rely on the determination by the EEOC, put into effect by *Summers*, that even if an individual suffers temporarily from long COVID, it may nevertheless count as a disability if severe enough. In that case, a claimant with severe yet temporary or episodic symptoms from long COVID may prevail on an ADA claim.[127]

However, if a claimant's impairment stemming from long COVID only lasts a few weeks or months, or is episodic in character, a court following *Rinehimer* and its progeny may dismiss such a claim for impermanence and an inherent lack of severity. These inconsistent outcomes could lead to a substantial portion of those with long COVID being denied coverage by the ADA while others are allowed to go forward with their claims, depending on what circuit they live in. This would further the lack of consistency across circuits and unfairly exclude certain individuals from the benefits of the ADA. Moreover, denying coverage may exacerbate existing inequalities that the ADA and ADAAA are designed to alleviate, such as accommodations for individuals to access public spaces or keep their jobs. Resolution of the circuit split and full effectuation of the long COVID guidance is imperative.

III. ALLEVIATING LONG COVID AND GIVING FULL EFFECT TO THE ADA

As previously stated, Congress granted the EEOC the statutory authority to promulgate rules interpreting and enforcing the provisions of the ADA.[128] This includes the definition of "disability." In exercise of that authorization, the EEOC explicitly provided that temporary, nonchronic, or episodic conditions may still qualify as disabilities under the ADA—the only requirement is that they are sufficiently severe enough to "substantially limit" a major life activity or bodily function.[129] Having satisfied *Chevron* "Step-Zero," and having issued a reasonable interpretation of the ADA in the absence of explicit statutory language speaking to a durational requirement, the EEOC's interpretation holding temporary conditions to be disabilities is deserving of *Chevron* deference. Therefore, the existing circuit split on this question should be resolved in favor of the Fourth Circuit's holding in *Summers v. Altarum Institute,*

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[126] GUIDANCE ON "LONG COVID", *supra* note 8.

[127] Still, the Guidance in question creates no legal obligation and does not claim to demand *Chevron* deference; the inquiry remains on a case-by-case basis.

[128] 42 U.S.C. § 12116.

[129] *Id.* at § 12102(1)(A).

Corp.—a conclusion supported by recent decisions in the Ninth Circuit and by lower courts.[130]

The Fourth Circuit in Summers was correct in its *Chevron* analysis, finding the EEOC had requisite authority to promulgate regulations interpreting the ADA, that the ADA itself did not afford a durational requirement, and that the EEOC's allowance of temporary disabilities was reasonable. In fact, district courts have already begun to follow this line of reasoning. Additionally, courts confronted with ADA claims dealing with conditions caused by long COVID should take into account HHS's relevant expertise and respect the judgments pronounced in the joint guidance from HHS and DOJ. Finally, affording *Chevron* deference to the EEOC and effectuating the HHS and DOJ guidance on long COVID also serves to further the purpose of the ADA by alleviating distributive justice concerns that have been exacerbated by the pandemic.

A. Deference to EEOC Interpretation

"*Chevron* Step-Zero," as articulated by the Court, provides that deference will only be given to agency action where that agency acts with the force of law, exercising the authority given to it by Congress.[131] The EEOC is explicitly authorized to interpret the ADA as amended.[132] Additionally, the new EEOC regulations in question were promulgated after notice-and-comment rulemaking, comporting with the administrative procedures required by the Administrative Procedure Act,[133] which produces rules "with the force of law."

In passing the ADAAA, Congress's intent was clear: the ADA was meant to be construed broadly and cover a wide range of conditions to the extent that the text will reasonably allow. Congress, however, did not fill every possible gap in the definitions of the organic statute. To rigidly define "disability" within the organic statute could cause the ADA to become too restrictive in its definition of "disability," as members of Congress could not contemplate every possible physical or mental impairment that might substantially limit one's ability to carry out a major life activity or bodily function. Indeed, COVID-19 could not have been a condition known to the enacting Congress. Instead, Congress granted authority to agencies such as the EEOC to interpret and further elaborate upon the definition of a "disability," to effectuate the goals of the ADA and provide broad coverage.[134]

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[130] *See* Shield v. Credit One Bank, 32 F.4th 1218 (9th Cir. 2022); Brown v. Roanoke Rehabilitation & Healthcare Center, No. 3:21-CV-00590-RAH, 2022 WL 532936 (N.D. Ala. Feb. 22,2022).

[131] *See* United States v. Mead Corp., 533 U.S. 218 (2001).

[132] 42 U.S.C. § 12116.

[133] *See* 5 U.S.C. § 553(c).

[134] *See* Statement of the Managers, *supra* note 45.

A lack of specific durational requirement for disabilities (besides noting that episodic conditions may still qualify if substantially limiting when they are active)[135] serves as an ambiguity in the statute for the purposes of *Chevron*'s first step. Congress has not directly spoken to the issue, so the agency that has been authorized to interpret and issue regulations by the statute is justified in exercising that authority. *Chevron* only requires that an agency's interpretation be a reasonable reading of the text, not that the reading is the *only* possible reading of the text.[136]

Nothing within the text of the ADA is inconsistent with extending coverage to conditions that are temporary or non-chronic. In fact, the ADAAA's addition that episodic conditions may still qualify, even if they are not "permanent" in the sense that the "substantially limiting" symptoms of the condition wax and wane, bolster the reading of the statute that conditions need not be permanent. The formulation by the EEOC does not completely preclude limitations on the applicability of the ADA to temporary conditions; the conditions are still subject to the "substantially limiting" requirement and must limit a "major life activity" or bodily function.[137] If a temporary condition is not severe enough to limit a major life activity, the ADA will not apply. Thus, the EEOC's interpretation of "disability" to include temporary, non-chronic conditions is a reasonable reading of the statute and is entitled to *Chevron* deference. This is the analysis correctly formulated by the Fourth Circuit in *Summers*.

By contrast, courts on the other side of the split denying broad coverage of temporary conditions under the ADA rely on pre-ADAAA caselaw extending back to cases relying on the now-defunct language of the original ADA and pre-ADAAA regulations. *Rinehimer* was decided in 2002, seven years before the ADAAA took effect and before Congress clarified its intent for the statute to apply broadly. *McDonald* was decided even earlier, in 1995, and relied upon caselaw interpreting the Rehabilitation Act, not the ADA, and now-outdated regulations. Yet, Third Circuit courts continue to rely on precedent that is inconsistent with the ADAAA and no longer applicable law. *Bolden v. Magee Women's Hospital of University of Pittsburgh Medical Center*,[138] an unpublished Third Circuit decision from 2008, also relied on previous EEOC regulations[139] which have since been revised, despite the newly

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[135] 42 U.S.C. § 12102(4)(D).

[136] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984).

[137] 42 U.S.C. § 12102(1)(A), (2)(A)–(B).

[138] 281 F. App'x 88 (3d Cir. 2008).

[139] *Id.* at 90.

introduced ADAAA. Reliance on these cases in the present day, after the enactment of the ADAAA and new EEOC regulations promulgated pursuant to its statutory authority, runs afoul of explicitly articulated congressional intent and undermines the EEOC's authority to promulgate regulations interpreting and implementing the ADA.

Finally, the Court itself has already spoken on how to evaluate agency interpretations in light of contrary prior caselaw. In *National Cable & Telecommunications Association v. Brand X Internet Services*,[140] the Court held that when agency articulations warrant *Chevron* deference, such pronouncements can overrule past contrary caselaw.[141] Specifically, when a court interprets a statute before an appropriate agency makes its own interpretations, the "prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute" and "leaves no room for agency discretion."[142] Thus, so long as the interpretation put forth by the agency is issued pursuant to its statutory authority and is reasonable, that interpretation can reverse courts' original interpretation after the fact.

Under *Brand X*, the Third Circuit's interpretation of ADA standards in *Rinehimer* would prevail over the EEOC's updated regulations only if precluding temporary conditions followed the unambiguous terms of the ADA and left no room for other interpretations. This is plainly not the case. The ADA provides that conditions that are episodic may still qualify as disabilities and otherwise makes no mention of a durational requirement.[143] In passing the ADAAA, Congress explicitly granted authority to the EEOC to issue regulations interpreting the text of the statute. Because the EEOC's interpretation of the ADA as allowing non-permanent conditions to be possible disabilities is not an unreasonable interpretation of unambiguous text, the agency pronouncement overrides prior caselaw unduly restricting the text of the ADA.

This circuit split, therefore, should be resolved in favor of the Fourth Circuit's holding in *Summers* by affording *Chevron* deference to the EEOC. Resolving the split in favor of *Chevron* deference respects the EEOC's statutorily given authority to interpret and administer the ADA, creates uniformity across jurisdictions by deferring to a reasonable, validly promulgated interpretation of the ADA, and supports Congress's intent in passing the ADA for its provisions to apply broadly and

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[140] 545 U.S. 967 (2005).

[141] *Id.* at 982.

[142] *Id.*

[143] 42 U.S.C. § 12102(4)(D).

provide robust protection against discrimination for disabled Americans.

On May 6, 2022, the Ninth Circuit, following *Summers*, endorsed this line of analysis in *Shields v. Credit One Bank*.[144] The plaintiff in *Shields* was unable to return to work at her Human Resources job due to postsurgical injuries on her arm and shoulder; her employer terminated her after receiving a note from her doctor that she was unable to work.[145] However, because she had not pled facts showing "permanent" or "long-term" impairment, the district court dismissed her action against her employer for discrimination.[146] The Ninth Circuit, however, found the district court in error, specifically for relying on the pre-ADAAA regulations in coming to its conclusion subjecting "disability" to categorical temporal limitations, rather than treating duration as one factor within the larger inquiry.[147] The *Shields* court decisively concluded in its analysis of the history of the ADA and ADAAA that "the ADA and its implementing EEOC regulations make clear that the actual-impairment prong of the definition of 'disability' in § 3(1)(A) of the ADA is not subject to any categorical temporal limitation," specifically citing *Summers* as support for its analysis under *Chevron*.[148] This Ninth Circuit ruling provides robust support for resolving the current split in favor of the Fourth Circuit's judicial deference—other circuits are beginning to recognize that a reading affording deference, and a broad construction of the ADA, is proper.

Lower courts have also already begun to give effect to the *Summers* formulation and have cited the guidance issued by HHS and DOJ. In *Brown v. Roanoke Rehabilitation & Healthcare Center*,[149] the plaintiff, a nursing assistant, filed suit against her employer under the ADA for refusing to provide the reasonable accommodation of temporary leave in light of her isolation period for a severe case of COVID-19.[150] The Alabama district court ruled that the plaintiff had pled facts sufficient to support her coverage as disabled under the ADA, citing the Long COVID Guidance discussed within this Comment.[151] Although the court correctly noted the Guidance was not binding, the court correctly recognized that Congress intended the construction of "disability" under the

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[144] 32 F.4th 1218 (9th Cir. 2022).

[145] *Id.* at 1220–21.

[146] *Id.* at 1221.

[147] *Id.* at 1225.

[148] *Id.*

[149] No. 3:21-CV-00590-RAH, 2022 WL 532936 (M.D. Ala. Feb. 22, 2022).

[150] *Id.* at *2.

[151] *Id.* at *3 ("To begin, recent guidance by the Department of Health and Human Services and Department of Justice indicates that certain forms of COVID-19 may be considered a disability under the ADA.").

ADA to be broad, and that "persons with 'sufficiently severe' impairments from COVID-19 may be covered even if those impairments are not 'long-term.'"[152] This recent ruling indicates that lower courts have implicitly accepted the *Summers* line of reasoning and incline to defer to appropriate agencies; resolving the matter in favor of deference reinforces this already-existing trend.

B. Deference in *Chevron*'s Uncertain Future

It is worth acknowledging at this point the uncertain future of the *Chevron* doctrine. Multiple Justices on the Court have expressed their qualms with the *Chevron* doctrine.[153] Justice Gorsuch, in dissent in *Burlington Northern Santa Fe Railway v. Loos*,[154] commented that the *Chevron* doctrine, "if it retains any force, would seem to allow BNSF to parlay any statutory ambiguity into a colorable argument for judicial deference to the IRS's view, regardless of the Court's best independent understanding of the law."[155] Other recent Court decisions have also called into question how long, and how far, *Chevron* deference will continue to extend.[156] The Court's behavior has suggested the possibility of narrowing, if not outright overruling, *Chevron* in the future.

Despite the multitude of pathways in which this caselaw might develop, it stands that the EEOC's regulations interpreting the ADA should be afforded deference by courts, regardless of *Chevron*'s status. The EEOC regulations' ability to meet *Chevron*'s more stringent criteria indicates that the agency's interpretation carries several indicia of persuasiveness applicable in the less-demanding *Skidmore*-type analysis for deference. This case does not concern a typical ambiguity in a word or phrase contained within the text, in which an agency chooses one possible definition over the other of its own accord. In this case, Congress was explicit in granting authority to the EEOC to enforce and interpret the text of the ADA; it granted the EEOC the authority to decide *the* definition of disability for the purposes of enforcing the statute.[157]

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[152] *Id.*

[153] *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 934–35, 935 n.15 (2021) (describing suggestions from Justices Neil Gorsuch and Clarence Thomas that *Chevron* violates the separation of powers principle).

[154] 139 S. Ct. 893 (2019).

[155] *Id.* at 908 (Gorsuch, J., dissenting).

[156] *See, e.g.*, Babb v. Wilkie, 140 S. Ct. 1168 (2020) (failing to discuss *Chevron*, despite disagreement in the briefs over the applicability of *Chevron*); PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2055 (2019) (declining to decide whether a Federal Communications Commission final order was eligible for *Chevron* deference); *see also* Hickman & Nielson, *supra* note 153, at 935 (noting that Chief Justice John Roberts and Justice Alito have urged a narrower version of *Chevron*).

[157] 42 U.S.C. § 12116.

In this way, Congress was clear in its intent for the EEOC to act in this manner. Courts have little reason to interfere with an agency acting on direct authority from Congress.

Furthermore, one of the benefits furnished by judicial deference to agency interpretations is uniformity among jurisdictions. As illustrated, district courts continue to rely upon *Rinehimer* and the Third Circuit's faulty reasoning in denying ADA coverage to plaintiffs with temporary disabilities. This result is not only inconsistent with EEOC regulations but also with other circuit court understandings of the law, including the Fourth Circuit's.[158] Regardless of the future of the *Chevron* doctrine, it is in the interest of justice for parties to have uniformity regarding the possible claims they may pursue under the ADA—it makes little sense for the same condition to be a disability in one jurisdiction but not another. As a policy matter, where such a strong case for judicial deference to agency interpretation such as this one exists, it remains reasonable for courts across jurisdictions to defer to a single reasonable interpretation rather than develop a body of conflicting caselaw across individual courts.

C. Effectuating Long COVID Guidance

The July 2021 guidance from the DOJ and HHS itself notes that it is not a legislative rule that carries force of law[159] in the same way that a regulation issued through notice-and-comment rulemaking is. HHS is not among the agencies authorized to issue regulations or interpret the ADA (although DOJ, through the Attorney General, is).[160] A non-binding guidance document, as noted by the Court in *Christensen*, may be afforded *Skidmore*-type deference at most. However, given its reliance on valid EEOC regulations interpreting the ADA, as well as the specialized expertise and policy judgment provided by HHS, courts should give due respect to the joint guidance from HHS and DOJ regarding long COVID as a possible disability.

The long COVID guidance is consistent with, and relies upon language within, the ADA itself or from EEOC regulations. The ADA provides coverage for impairments which "substantially limit" major life activities, and EEOC regulations implementing the ADA clearly establish that such impairments need not be permanent.[161] Heeding such guidance simply assures that those with long COVID that substantially limits their major life activities will not be dismissed out of hand for

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[158] *See* Summers v. Altarum Inst. Corp., 740 F.3d 325 (4th Cir. 2014).

[159] GUIDANCE ON "LONG COVID", *supra* note 8.

[160] 42 U.S.C. § 12116.

[161] 29 C.F.R. § 1630.2(j)(4); 42 U.S.C. § 12102(1)(A); GUIDANCE ON "LONG COVID", *supra* note 8.

claiming coverage under the ADA solely because their disability may be only temporary. As the guidance itself notes, the determination of whether an individual with long COVID is disabled within the meaning of the ADA is necessarily made on a case-by-case basis, with attention to the specific facts of each case.[162] The guidance affords wide discretion in making this determination and does not leave decisionmakers bound in determining ADA eligibility for claimants with long COVID if their symptoms are not substantially limiting.

Where agency pronouncements "reflect the application of expertise to a question on which there is statutory ambiguity" and are issued through proper procedures, such interpretations warrant "great respect."[163] Judges are not epidemiologists; HHS, by contrast, is well-situated to provide persuasive interpretations of the ADA by virtue of its technical expertise, which individual judges and Congress lack. The guidance issued by HHS regarding long COVID as a disability reflects its relevant expertise. HHS's stated purpose is to "enhance the health and well-being" of Americans,[164] and, to that end, includes several services and agencies within it dedicated to understanding the human body and how to best promote the collective health of the country. Notably, the body responsible for most of the COVID-19 information, procedures, and research—the CDC—is included within HHS.[165] Additionally, HHS was authorized to issue regulations regarding the Rehabilitation Act of 1973, a predecessor of the ADA from which the ADA heavily draws. The Court routinely cited to HHS regulations interpreting the Rehabilitation Act in cases dealing with the ADA and its surrounding regulatory schema,[166] which suggests it recognized the authority of HHS on these matters.

Furthermore, as noted by the *Chevron* majority, just as judges "are not experts in the field," nor are they part of either "political branch" of the government.[167] Substantive decisions, especially policy decisions, are outside the scope of what courts may decide. Moreover, the guidance was released "by the White House as part of a comprehensive package

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[162] *See* GUIDANCE ON "LONG COVID" AS A DISABILITY UNDER THE ADA, *supra* note 8 ("An individualized assessment is necessary to determine whether a person's long COVID condition or any of its symptoms substantially limits a major life activity").

[163] Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1949 (2006).

[164] *About HHS*, U.S. DEP'T OF HEALTH AND HUM. SERVS., https://www.hhs.gov/about/index.html [https://perma.cc/9RAC-86QH] (last visited Aug. 1, 2022).

[165] *HHS Agencies & Offices*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (Oct. 27, 2015), https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html [https://perma.cc/93LZ-56TZ].

[166] *See* Bragdon v. Abbott, 524 U.S. 624 (1998); *see also* Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002).

[167] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

of resources for people with long COVID."[168] The context in which this guidance was issued speaks to the policy-driven goals underlying the guidance. It was issued at the direction of an elected executive, whose policy priority was to support and provide resources for individuals suffering from long COVID symptoms.[169] A politically accountable actor such as the President is better situated, relative to the courts, to make policy decisions in implementing Congress's laws, bolstering the case for judicial deference.

It is true that courts may be less likely to respect agency pronouncements when they reflect political agendas, wishing to resist the back-and-forth of political actors in interpreting the law.[170] However, the policy decision to provide the widest range of support options to individuals with long COVID is based upon a recognition that long COVID might qualify as a disability, not the other way around. A recognition of fact that long COVID can be debilitating is the basis for the decision to issue guidance; the guidance is not the reason for long COVID's severity. The choice was political because COVID-19 has become a controversial issue to the American population, with some questioning the severity of the disease and the justification of increased protective measures.[171] To the extent that deciding whether COVID-19 constitutes a disability is heavily politicized, it is not a question for judges to determine whether they individually believe an individual's long COVID is sufficiently severe. Additionally, the political responsiveness of this choice reflects the need to be sensitive to equitable and distributive concerns impacting vulnerable populations of American society.

D. Distributive Justice

A myriad of racial and class disparities exist within health risks and outcomes when it comes to the COVID-19 pandemic. A June 2021

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[168] *HHS and DOJ Issue Guidance on "Long COVID" and Disability Rights Under the ADA, Section 504, and Section 1557*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (July 26, 2021) https://www.hhs.gov/about/news/2021/07/26/hhs-doj-issue-guidance-on-long-covid-and-disability-rights.html [https://perma.cc/S7R5-CXBX].

[169] *FACT SHEET: Biden-Harris Administration Marks Anniversary of Americans with Disabilities Act and Announces Resources to Support Individuals with Long COVID*, WHITE HOUSE (July 26, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/26/fact-sheet-biden-harris-administration-marks-anniversary-of-americans-with-disabilities-act-and-announces-resources-to-support-individuals-with-long-covid/ [https://perma.cc/CA8H-9HGL].

[170] *See*, *e.g.*, Garco Constr., Inc. v. Speer, 138 S. Ct. 1052, 1052–53 (2018) (Thomas, J., dissenting) (suggesting that judicial deference can undermine the independent "judicial check" on political branches' interpretation of the law).

[171] *See*, *e.g.*, Julia Manchester, *COVID-19 Rules Boomerang on Democrats*, HILL (Feb. 17, 2022), https://thehill.com/homenews/campaign/594603-democrats-face-blowback-over-covid-19-policies [https://perma.cc/4C3C-8Y8J] (describing backlash against COVID-19 protective measures from frustrated voters, and disagreements between Republicans and Democrats as to the efficacy of COVID-19 measures and underlying science).

study showed that Black and Hispanic Americans experience higher incidences, hospitalization, and mortality rates for COVID-19 as compared to White Americans.[172] This could be due to a variety of factors. The CDC acknowledged that social determinants heavily linked to race, such as neighborhood and physical environment, housing, occupation, education, and economic stability play a role in COVID-19 risks because discrimination "shapes social and economic factors that put some people . . . at increased risk for COVID-19."[173] By extension, the risk of experiencing long COVID symptoms is greater among communities disparately impacted by the pandemic. Those belonging to racial and ethnic minority groups are more likely to live in areas with high rates of COVID-19 infections[174] and have worse outcomes, reflecting stark health inequities.[175]

In addition, there exists a clear class divide between workers who can and cannot work from home,[176] which is a common protective measure and accommodation for immunocompromised individuals. Therefore, individuals unable to work from home are more at risk of being exposed to the virus. According to a survey of U.S. adults conducted by Pew Research Center, sixty-two percent of workers with a bachelor's degree or more education report being able to complete their job responsibilities from home, compared to twenty-three percent of workers without a four-year degree.[177] The same survey showed seventy-six percent of lower income employed adults were unable to work from home, and experienced increased concern about being exposed to COVID-19.[178] This class divide has a racial dimension as well: racial minorities are disproportionately represented in essential occupations that have increased exposure risk to COVID-19.[179]

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[172] William Mude et al., *Racial Disparities in COVID-19 Pandemic Cases, Hospitalisations, and Deaths: A Systematic Review and Meta-Analysis*, 11 J. GLOB. 1 (June 26, 2021).

[173] *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 19, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html [https://perma.cc/W7Y2-KG26].

[174] Gregorio A. Millet et al., *Assessing Differential Impacts of COVID-19 on Black Communities*, 47 ANNALS OF EPIDEMIOLOGY 37 (2020).

[175] Marie E. Killerby et al., *Characteristics Associated with Hospitalization Among Patients with COVID-19 — Metropolitan Atlanta, Georgia, March–April 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 790, 792 (June 26, 2020).

[176] Kim Parker et al., *How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/ [https://perma.cc/WTA3-DS28].

[177] *Id.*

[178] *Id.*

[179] Devan Hawkins, *Differential Occupational Risk for COVID-19 and Other Infection Exposure According to Race and Ethnicity*, AM. J. INDUS. MED. 817, 817 (2020).

A holistic view of the disparate impacts the COVID-19 pandemic has had on disadvantaged communities shows that broad coverage under the ADA and the inclusion of long COVID is necessary to address distributive justice concerns. Those most at risk of exposure to COVID-19 and most likely to experience long COVID symptoms tend to be workers with job duties that are not easily completed while social distancing or working from home. These jobs tend to be jobs that generate lower income (for example, food service workers). Thus, with fewer accommodations being available, these workers are less likely to be able to complete their job duties and are more at risk of losing their employment due to a disability caused by long COVID.

Addressing these concerns is consistent with the findings and purposes of the ADA. The legislative history of the ADA reveals that the enacting Congress was concerned with inadequate protections and "the pervasive problems of discrimination that people with disabilities are facing,"[180] concluding that omnibus legislation was needed to "finally set in place the necessary civil rights protections for people with disabilities."[181] As such, the findings and purposes included within the ADA notes that individuals with disabilities are often "severely disadvantaged socially, vocationally, economically, and educationally."[182]

As demonstrated, there is significant overlap between marginalized communities and serious concerns about health equity and outcome disparities. Long COVID may cause physical limitations that prevent people from carrying out basic life activities and from doing manual labor. Many of the most labor-intensive jobs employ marginalized populations along racial and class divisions. Long COVID creates a situation where a disability disproportionately impacts a portion of the workforce who otherwise cannot perform their job duties; the ADA, being enacted to assure all an equal opportunity to participate in the workforce, was crafted to remedy this very situation. Construing ADA applicability broadly to cover the most individuals will likely alleviate many issues of distributive justice and allow vulnerable populations to keep their jobs and operate in safe public environments.

E. Administrability

A final concern regarding qualifying long COVID as a disability under the ADA comes in the form of feasibility and administrability. Widening the scope of the ADA to include a greater number of conditions and thus more individual cases appears as though it might open a

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[180] S. Rep. No. 101–116, 1st Sess. 18 (1989).

[181] H. R. Rep. No. 101–485(II), 2d Sess. 40 (1990).

[182] 42 U.S.C. § 12101(a)(6).

"floodgate" of litigation and overwhelm limited resources to address such claims. However, safeguards for the preservation of judicial resources are already in place in the form of administrative procedure and alternative dispute resolution. Additionally, in light of the labor shortage and other economic strains ongoing in the United States due to the COVID-19 pandemic, employers and public services could find it less costly to provide accommodations for long COVID over pursuing litigation and losing employees.[183]

For an ADA claim to be successful, an entity covered by the ADA must first deny a reasonable accommodation request to a disabled individual. Then, to allege disability discrimination by an employer, a claim must be filed through the EEOC.[184] The EEOC will subsequently investigate the charge and determine the best course of action, which might include litigation, but often does not. Most cases are resolved by alternative means such as mediation or are found to have no reasonable cause for action at all.[185] Recent data from the EEOC shows that as many as two-thirds of claims made are unactionable, and only about one-fifth result in "merit resolutions,"[186] which signals a charge with "meritorious allegations."[187] This evinces the EEOC's broad discretion in which charges to pursue.

Similarly, for alleging discrimination by a state or local government or a public accommodation, an aggrieved individual may file a complaint with the Disability Rights Section in the Department of Justice.[188] From there, the DOJ may refer the complainant to other agencies for investigation, refer the individual for alternative dispute resolution such as mediation, or, as a final possibility, consider pursuing litigation.[189] The Department of Justice oversees an ADA Mediation

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[183] *See*, *e.g.*, TICKET TO WORK, *Money Mondays: The (Low and No) Cost of Reasonable Accommodations*, SOC. SEC. ADMIN. (July 10, 2017), https://choosework.ssa.gov/blog/2017-07-10-mm-the-low-and-no-cost-of-reasonable-accommodations [https://perma.cc/B956-QP3M].

[184] *Filing a Complaint with the Equal Employment Opportunity Commission*, DEP'T OF JUST., https://www.ada.gov/filing_eeoc_complaint.htm [https://perma.cc/79CH-KVWW] (last visited Aug. 1, 2022).

[185] *Americans with Disabilities Act of 1990 (ADA) Charges (Charges Filed with EEOC) (Includes Concurrent Charges with Title VII, ADEA, EPA, and GINA) FY 1997- FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/americans-disabilities-act-1990-ada-charges-charges-filed-eeoc-includes-concurrent [https://perma.cc/EKH4-5AVA] (last visited Aug. 1, 2022).

[186] *Id.*

[187] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Definitions of Terms*, https://www.eeoc.gov/statistics/definitions-terms [https://perma.cc/28N5-T44K].

[188] *How to File an Americans with Disabilities Act Complaint with the U.S. Department of Justice*, DEP'T OF JUST., https://www.ada.gov/filing_complaint.htm [https://perma.cc/JB2T-CWYM] (last visited Aug. 1, 2022).

[189] *Id.*

Program specifically designed to resolve ADA disputes quickly and efficiently.[190] Congress expressly favored this method of dispute resolution over litigation, stating within the ADA itself that "the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes."[191]

Ultimately, the agency retains broad discretion in which claims to investigate and litigate, plainly stating that the agency "cannot investigate or litigate every complaint."[192] The decision to litigate an ADA claim may then carry much weight. If the DOJ elects to advance a complaint regarding long COVID limitations to the litigation stage, the DOJ, an enforcing agency of the ADA, would implicitly recognize the possibility that long COVID may legally qualify as a disability. Therefore, including long COVID cases as possible disabilities under the ADA, along with endorsing the view that long COVID *can* constitute a disability, would not necessarily overwhelm judicial resources. The DOJ already filters such claims through its filing procedures and resolves many disputes arising under the ADA through means of alternative dispute resolution

Moreover, providing broad coverage to disabled individuals would benefit disabled populations and would likely place minimal additional burdens on employers and public services. For example, if standing is too tiring as an activity or an employee experiences dizziness, a reasonable modification may be to allow that employee to sit during her duties if possible. The Fourth Circuit in *Summers v. Altarum Institute, Corp.* also noted that the burden on employers is likely to be low for extending coverage to temporary disabilities, as the accommodations last only as long as the disability endures.[193] Additionally, the EEOC provided extensive information and examples for employers regarding reasonable accommodations for those most at-risk for COVID infection, including installing plexiglass or other barriers to ensure distancing.[194] The United States began experiencing a large-scale worker shortage, believed to be largely a result of the COVID-19 pandemic and millions

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[190] *Department of Justice Responsibilities: ADA Mediation Program*, DEP'T OF JUST., https://www.ada.gov/mediate.htm [https://perma.cc/SG84-UT8Z] (last visited Aug. 1, 2022).

[191] 42 U.S.C. § 12212.

[192] *How to File an Americans with Disabilities Act Complaint with the U.S. Department of Justice*, *supra* note 188.

[193] Summers v. Altarum Inst., Corp., 740 F.3d 325, 332 (4th Cir. 2014).

[194] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (Mar. 14, 2022), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [https://perma.cc/B299-37C3].

contracting long COVID symptoms.[195] A Brookings Institution analysis estimated around 1.6 million workers were missing from the full-time workforce due to long COVID.[196] Such a labor shortage has shown to have destructive effects on a wide range of industries and on the economy as a whole.[197] Of course, the availability of modifications and accommodations for disabilities caused by long COVID vary widely on a case-by-case basis, but employers may find it efficient to provide temporary accommodations for workers suffering from long COVID than to lose workers. Employers and entities in general may prefer to accommodate rather than subject themselves to costly litigation as a result of denying accommodation.

IV. CONCLUSION

The COVID-19 pandemic has placed immeasurable burdens on American citizens, including causing "long COVID" conditions in a substantial number of those infected by the virus. If an individual is experiencing severe, long-term COVID-19 complications, regardless of whether or not that condition proves to be temporary or episodic, the objective of the ADA is to provide that individual with protection from disability discrimination. Seeing as how lower courts are already being confronted with this precise issue and appear to be following the *Summers* formulation subsequently followed by the Ninth Circuit in *Shields*, the law would benefit from uniformization and certainty. Courts should follow validly promulgated EEOC regulations interpreting the ADA, and the joint guidance issued by HHS and DOJ should be afforded respect by courts in the future when confronting ADA claims arising from long COVID cases. This not only respects EEOC's authority to implement its provisions but also serves to alleviate racial and economic health disparities caused by COVID-19 that are related to disability discrimination, which comports with and furthers the equalizing purpose of the ADA.

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[195] Aimee Picchi, *A Cause of America's Labor Shortage: Millions with Long COVID*, CBS NEWS (Feb. 1, 2022), https://www.cbsnews.com/news/long-covid-labor-market-missing-workers/ [https://perma.cc/M35Y-M33W].

[196] *Id.*

[197] *Id.*