

**“HANDICAP” UNDER THE FAIR HOUSING ACT
AMENDMENTS: DO THE FHAA, THE ADA, AND THE
REHABILITATION ACT STILL SHARE A COEXTENSIVE
DEFINITION?**

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I. INTRODUCTION

Three interrelated federal laws currently prohibit discrimination based on disability: Section 504 of the Rehabilitation Act of 1973,¹ the Americans with Disabilities Act of 1990 (ADA),² and the Fair Housing Act (FHA),³ as amended in 1988 by the Fair Housing Amendments Act (FHAA).⁴ Congress explicitly borrowed from the Rehabilitation Act's definition of disability when it enacted both the ADA and the FHAA.⁵ Prior to 2008, the law interpreting that definition among the three statutes was aligned.⁶ In 2008, however, that alignment changed.⁷ In response to judicial rulings that made it excessively difficult to establish a covered disability, Congress enacted the Americans with Disabilities Act Amendments Act (ADAAA) to codify Rules of Construction,

1. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as 29 U.S.C. § 794(a)).

2. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as 42 U.S.C. §§ 12101–12113).

3. 42 U.S.C. §§ 3601–3619.

4. Fair Housing Amendments Act of 1988 (FHAA), Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1619 (codified at 42 U.S.C. § 3604). Among other things, the FHAA expanded the protected categories under the FHA to familial status and handicap. *See* 42 U.S.C. § 3604 (c)–(f).

5. *See* *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (explaining that “[t]he ADA’s definition of disability is drawn almost verbatim from the definition of ‘handicapped individual’ included in the Rehabilitation Act of 1973, and the definition of ‘handicap’ contained in the Fair Housing Amendments Act of 1988”) (internal citations omitted); H.R. REP. NO. 100-711, at 17 (1998), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2178 (explaining that the FHAA “uses the same definitions and concepts from” § 504 of the Rehabilitation Act of 1973).

6. *See* JoAnn Nesta Burnett & Gary A. Poliakoff, *Prescription Pets: Medical Necessity or Personal Preference*, 36 NOVA L. REV. 451, 456 (2012) (discussing the history of “almost universal application” of the ADA and FHAA); DEP’T OF HOUS. & URBAN DEV. & DEP’T OF JUSTICE, JOINT STATEMENT: REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT, 1 n.2 (May 17, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf [<https://perma.cc/886V-XS42>] (stating that disability and handicap “have the same legal meaning”).

7. *See* Burnett & Poliakoff, *supra* note 6, at 546 (noting that the ADA and FHA began to diverge after 2008); *see also* *Kearins v. Vill. Creek of Eldorado Home Owners’ Ass’n, Inc.*, No. 4:17-CV-00769, 2019 WL 2266635, at *4 (E.D. Tex. Mar. 5, 2019), *report and recommendation adopted*, No. 4:17-CV-00769, 2019 WL 1760521 (E.D. Tex. Apr. 22, 2019) (reasoning that “a person could be considered disabled under the ADA, but not handicapped under the FHA”).

emphasizing Congress's intent to create a broad protected class.⁸ The ADAAA similarly amended § 504 to incorporate the ADAAA's definition of disability.⁹ The same was not true, however, for the FHA, at least not explicitly. There is currently no statutory language directing courts to interpret the protected class in that statute coextensive with its definitional source, the Rehabilitation Act, or with its cousin, the ADA.¹⁰

This left courts in FHA cases unclear whether they should continue to apply the restrictive judicial interpretations of the original ADA that the ADAAA rejected.¹¹ Pre-ADAAA standards, such as requiring an impairment to be permanent and long term, requiring it to severely restrict a major life activity, and evaluating the plaintiff's impairment after taking into account any ameliorative steps such as medication, continue to show up in post-ADAAA FHA cases.¹² This is broadly connected to how the Department of Housing and Urban Development (HUD) divides housing disability accommodation claims into two categories. When a disability is "readily apparent," HUD indicates the housing provider should not make any further inquiry into the disability or the disability-related need for a requested accommodation.¹³ But when the disability is not readily apparent, housing providers "may request reliable disability-related information that . . . is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities)."¹⁴ Individuals who

8. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555–56 (codified as amended at 42 U.S.C. § 12102(4)).

9. § 7, 122 Stat. at 3358; *see also* 29 U.S.C. § 794(d); 42 U.S.C. 12111 §§ 501–510 (providing that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections related to employment").

10. *See, e.g., Kearins*, 2019 WL 2266635, at *4 (reasoning that "because the ADAAA explicitly lowered the standard for 'substantially limits,' and the FHA has not been similarly amended, a person could be considered disabled under the ADA, but not handicapped under the FHA").

11. *See McKivitz v. Twp. of Stowe*, 769 F. Supp. 2d 803, 821 n.15 (W.D. Pa. 2010) (recognizing the ADAAA "broadened the category of individuals entitled to statutory protection under the ADA and the Rehabilitation Act" but concluding "[t]here is no need for the Court to consider whether, in the aftermath of the ADA Amendments Act, some individuals who are 'disabled' within the meaning of the ADA and the Rehabilitation Act may not be 'handicapped' within the meaning of the FHA"); *see also* Burnett & Poliakoff, *supra* note 6 (asserting that "[b]oth terms have the same legal meaning" but then acknowledging post-2008, "the Acts are beginning to take separate and divergent paths").

12. *See infra* Part III.

13. Burnett & Poliakoff, *supra* note 6, at 13.

14. *Id.*

allege mental health impairments or episodic impairments, which tend not to be readily apparent, face greater difficulty establishing their right to accommodation under HUD's approach because courts interpreting the FHAA either do not follow the ADAAA's admonition that determining whether an impairment is a disability should not require extensive evidence,¹⁵ or they apply pre-ADAAA standards directly or indirectly through citation of superseded precedent, something Professor Deborah Widiss has called "shadow precedent."¹⁶

At least one court has suggested there is no cause for concern because "the ADA and the [Rehabilitation Act] may be broader than the FHA."¹⁷ The authority cited by that court considered an unrelated part of the FHA that used distinct language to describe its scope—something the court did not acknowledge.¹⁸ The court's suggestion conflicts with other courts that have found the right to housing to be "on a par" with the right to a job.¹⁹ Rather than a deliberate legislative choice, the effect on the FHA appears to be the result of an oversight, part of a pattern where Congress patches one statute and either assumes courts will apply that patch wherever the patched language appears in related statutes or simply fails to consider the prospect that they will not.²⁰ The roots of the FHAA are in the same statute

15. See *infra* notes 70–79 and accompanying text.

16. See *infra* notes 67–71; see also Deborah A. Widiss, *Still Kickin' After All These Years: Sutton and Toyota As Shadow Precedents*, 63 DRAKE L. REV. 919, 921 (2015) (explaining that "courts sometimes continue to follow the underlying reasoning of a decision even when the holding has been clearly superseded, or they continue to follow overridden decisions when interpreting similar language found in other statutes").

17. See *Bhogaita v. Altamonte Heights Condo. Assn., Inc.*, No. 6:11-CV-1637-ORL, 2012 WL 6562766, at *5 (M.D. Fla. Dec. 17, 2012), *aff'd sub nom. Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277 (11th Cir. 2014); see also *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 (11th Cir. 2008) (reasoning that "there are important differences among these statutes" and "the ADA and the RA may be broader than the FHA").

18. See *Schwarz*, 544 F.3d at 1212 n.6 (discussing potential differences in the proof model between the ADA and the Rehabilitation Act, and how unlike those two statutes, the FHA addresses only discrimination related to "dwellings").

19. See *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (noting that "[t]he inability to obtain an apartment is, we feel, on a par with the inability to obtain a job").

20. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (textually amending only the anti-discrimination provisions of Title VII, not the anti-retaliation provisions, to codify the mixed motive "motivating factor" proof model); see also *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353–57 (2013) (finding that "[w]hen Congress wrote the motivating-factor provision in 1991, it chose to insert it as a subsection within § 2000e-2, which contains Title VII's ban on status-based discrimination, § 2000e-2(a) to (d), (l), and says nothing about retaliation"); see § 107(a), 105 Stat. at 1075 (directing that § 2000e-2 . . . [be] further amended by adding at the end the following new subsection . . . (m))" and ruling that the mixed-motive burden shifting model codified by the Act does not

as the ADA, and this paper calls on courts and Congress to get back to those roots by making it clear the ADAAA applies to all federal anti-disability discrimination laws whose definition arises out of § 504.

Part II will cover the statutory landscape, showing the interrelation between the statutes and the uncertainty the ADAAA introduced regarding whether the statutes continue to have a universal definition of disability. Part III will show how courts continue to apply unduly narrow pre-ADAAA precedent when interpreting the FHAA, making it more difficult for FHA plaintiffs to get to the merit of their housing discrimination claims. Part IV establishes why there is no strong argument that the FHAA's definition of handicap should be less protective than that of the ADA and the Rehabilitation Act, and Part V will address why courts should recognize the textual basis for applying the ADAAA's Rules of Construction to all three statutes. Finally, Part VI will call upon Congress to eliminate any uncertainty by amending the FHAA to include language directing courts to interpret that statute's definition as coextensive with the ADA and the Rehabilitation Act.

II. THE RELATIONSHIP BETWEEN THE FHA, THE REHABILITATION ACT, AND THE ADA'S PROTECTED CLASSES

The FHAA amended the FHA to expand its list of characteristics protected from housing discrimination to include "handicap."²¹ The FHAA made it unlawful:

(1) [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

apply in retaliation cases, but instead the plaintiff has to prove "but for" the defendant's consideration of the protected characteristic, the defendant would not have taken adverse action against the plaintiff) (internal citations omitted).

21. See, e.g., FHAA, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1619 (codified at 42 U.S.C. § 3604) (amending various sections of the FHA to add "handicap" to the list of protected classes).

(2) [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.²²

Similar to the ADA²³ and § 504,²⁴ the FHAA has a reasonable accommodation mandate, making unlawful:

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that,

22. 42 U.S.C. § 3604(f)(1)–(2); *see also* 42 U.S.C. § 3604(c)–(e).

23. *See, e.g.*, 42 U.S.C. § 12112(b)(5)(A) (construing “discriminate” for purposes of employment discrimination to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee . . .”); *id.* § 12182(b)(2)(A) (defining discrimination by places of public accommodation to include “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities . . .”).

24. *See* 34 C.F.R. § 104.12 (2000) (requiring recipient of federal financial assistance to “make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity”); *but see* 29 U.S.C. § 794(a)), which provides only that:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id. (incorporating the ADA’s accommodation mandate into § 504 by subsection § 794(d) and finding that “[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment”).

in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]²⁵

The FHAA's use of the term "handicap" mirrored § 504's terminology at the time.²⁶ After the ADA adopted the term "disability" in 1990, Congress amended § 504 in 1992 to substitute "disability" for "handicap" without otherwise altering the definition of who was entitled to civil rights protections under the statute.²⁷ The FHA was not similarly amended and continues to be an outlier for its use of "handicap."

The FHAA defines "handicap" as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment"²⁸ The legislative record indicates Congress based the FHAA's definition on the "regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act."²⁹ Congress subsequently again relied on the § 504 regulations when it defined "disability" under the ADA.³⁰

Like the original text of the ADA, the FHAA does not further define what each part of the definition means except to exclude certain conditions

25. 42 U.S.C. § 3604(f)(3); *see also* 42 U.S.C. § 12112(b)(5)(A) (defining discrimination in employment to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee").

26. *See* The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as 29 U.S.C. § 794(a)).

27. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, §102(o)(32), 106 Stat. 4344, 4360 (1992).

28. 42 U.S.C. § 3602(h).

29. *See* H.R. REP. NO. 711, 100th Cong., 2d Sess. 18, 22 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2183 (stating that "[t]he Committee intends that the definition [of 'handicap'] be interpreted consistent with regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act"); 54 Fed. Reg. 3232, 3245 (Jan. 23, 1989) (noting "the clear legislative history indicating that Congress intended that the definition of 'handicap' be fully as broad as that provided by the Rehabilitation Act").

30. 42 U.S.C. § 12102(1).

categorically.³¹ The Department of Housing and Urban Development's (HUD) issued regulations in 1989 defining both "physical or mental impairment"³² and "major life activity"³³ based on § 504's regulations.³⁴ The original ADA regulations defining those terms were also based on § 504's regulations.³⁵ The ADAAA subsequently statutorily defined "major life activities," including the original list from the Rehabilitation

31. *See generally* 29 U.S.C. § 705(10)(B) (Rehabilitation Act); 29 U.S.C. § 3602(h) (FHA); 42 U.S.C. § 12111 (ADA) (categorically excluding from the definition of disability and handicap individuals who are currently illegally using drugs); *see also* § 12221(b) (ADA excluding other disorders); 24 C.F.R. § 100.201 (1989) (implementing FHAA regulations and providing that "[f]or purposes of this part, an individual shall not be considered to have a handicap solely because that individual is a transvestite"); 29 U.S.C. § 705(f) (2024) (Rehabilitation Act); 42 U.S.C. § 12211(b) (ADA) (adding other exclusions for "sexual behavior disorders" and compulsive disorders such as compulsive gambling).

32. 24 C.F.R. § 100.201 (1989). The regulation defined "[p]hysical or mental impairment" to include:

- (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
- (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

Id.

33. *Id.* ("Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.").

34. Fair Housing; Implementation of the Fair Housing Amendments Act of 1988, 53 Fed. Reg. 44992, 45000 (Nov. 7, 1988) ("Congress intended that the definition of 'handicap' in the Fair Housing Amendments Act to be interpreted in a manner that is consistent with regulations interpreting the meaning of the similar provision found in section 504 of the Rehabilitation Act of 1973 . . . Paragraphs (a), (b), (c) and (d) of the definition of 'handicap' closely follow the definitions of these key phrases used in regulations interpreting section 504.").

35. *See, e.g.,* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35726, 35726 (July 26, 1991) ("[T]he regulations implementing the employment provisions of the ADA [were] modeled on the regulations implementing section 504 of the Rehabilitation Act of 1973.").

Act regulations,³⁶ along with several additional activities and a subcategory of “major bodily functions.”³⁷

Both the ADA and the Rehabilitation Act explicitly direct courts to apply the same disability discrimination standards to each of those statutes.³⁸ Neither the FHA nor its regulations contain a similar provision.³⁹ Nonetheless, because both the FHAA and the ADA derive from § 504, courts generally applied the terms handicap and disability interchangeably between the three statutes, at least until the ADA was amended in 2008. For example, in *Bragdon v. Abbott*,⁴⁰ determining that

36. See, e.g., 28 C.F.R. § 41.31(b)(2) (1978) (defining major life activities to include “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working”).

37. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102(2)); see also Curtis D. Edmonds, *Lowering the Threshold: How Far Has the Americans with Disabilities Act Amendments Act Expanded Access to the Courts in Employment Litigation?*, 26 J.L. & POL’Y 1, 13 (2018) (discussing how the ADAAA expanded the definition of major life activity, including adding “eating, concentrating, thinking, and reading” to the non-exclusive list). The statutory definition provides:

(A) IN GENERAL.—For purposes of paragraph (1), 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.

(B) MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

§ 2, 122 Stat. at 3555. The ADAAA also defined “regarded as” discrimination to mean when an individual is “subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” *Id.* § 3(3)(A), 122 Stat. at 3555. The definition excludes “impairments that are transitory and minor,” which it defines as “an impairment with an actual or expected duration of 6 months or less.” *Id.* § 3(3)(B), 122 Stat. at 3555. Plaintiffs relying on the regarded as prong are not entitled to reasonable accommodations. *Id.* § 6(a)(1)(h), 122 Stat. at 3358.

38. 29 U.S.C. § 794(d) (“The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.”); 42 U.S.C. § 12201(a) (“Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title.”).

39. 42 U.S.C. §§ 3601–3619; 24 C.F.R. §§ 200.100–200.205 (1971).

40. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

asymptomatic HIV is a disability under the ADA,⁴¹ the United States Supreme Court explained that “[t]he ADA’s definition of disability is drawn almost verbatim from the definition of ‘handicapped individual’ included in the Rehabilitation Act of 1973, and the definition of ‘handicap’ contained in the Fair Housing Amendments Act of 1988.”⁴² The Seventh Circuit subsequently similarly reasoned that “[b]ecause both [the ADA and the FHAA] contain the same definition, we use the terms disabled and handicapped interchangeably throughout the opinion, and construe them consistently with each other.”⁴³ Following suit, HUD and the Department of Justice (DOJ) issued a Joint Statement in 2004 that simply stated “[b]oth terms have the same legal meaning.”⁴⁴

Thus, during the 1990s and early 2000s, the legal consensus was that § 504, the ADA, and the FHAA were coextensive regarding the scope of the protected class. During that time, however, courts were engaged in what has been called a “backlash” against the breadth of the ADA and its accommodation mandate, particularly in employment cases.⁴⁵ Their decisions made it inordinately difficult for plaintiffs to meet the threshold requirement to show they have a disability.⁴⁶ Congress responded in 2008 with the ADAAA.⁴⁷ The Findings and Purposes section of the ADAAA state that “Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973[; however], that expectation has not been fulfilled[.]”⁴⁸

The ADAAA’s Purposes section further states that Congress intended “to convey that . . . the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have

41. *Id.* at 631–32 (quoting 42 U.S.C. § 12201(a)).

42. *Id.* at 631 (internal citations omitted).

43. *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001) (citing *Bragdon*, 524 U.S. at 631).

44. *Burnett & Poliakoff*, *supra* note 6, at 1 n.2 (citing *Bragdon*, 524 U.S. at 631).

45. See generally LINDA HAMILTON KRIEGER, BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (2006) (characterizing judicial decisions that narrowed the ADA’s definition of disability as arising from a backlash); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000) (“The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resistant to it. It suggests that the courts are systematically nullifying rights that Congress conferred on people with disabilities.”).

46. See generally Cheryl L. Anderson, “Deserving Disabilities”: *Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83 (2000) (discussing difficulty plaintiffs experience in meeting the disability threshold in ADA cases).

47. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213).

48. *Id.* § 2(a)(3).

complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.⁴⁹ The ADAAA included Rules of Construction directing courts to apply the definition of disability broadly.⁵⁰ Among other things, Congress rejected the Supreme Court's holding that the substantiality of a person's impairment should be measured in its mitigated state (i.e., after taking medication or other steps to ameliorate the effects of the impairment).⁵¹ Congress was clear that a disability did not need to be permanent or long term in order for courts to find it substantially limiting.⁵² It also eliminated the need to consider substantial limitation at all under the "regarded as" prong.⁵³

Because the ADA and Rehabilitation Act already had conforming provisions, there was little question that the ADAAA's revised standards would apply to § 504 claims.⁵⁴ That was not the case with the FHAA.⁵⁵ Courts had to consider, as a threshold matter, whether to apply the new standards or continue to look to the precedent that the ADAAA explicitly rejected. The result in the reported decisions has been that a few courts have applied the ADAAA,⁵⁶ while several others find pre-ADAAA standards continue to apply.⁵⁷ Cases frequently cite pre-ADAAA precedent articulating standards rejected by Congress.⁵⁸ To some degree, this has also been true in ADA cases post-ADAAA,⁵⁹ but there it is clear

49. *Id.* § 2(b)(5).

50. *Id.* § 3(4).

51. *Id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(D)).

52. *Id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(E)).

53. ADA Amendments Act of 2008, Pub. L. No. 110-325, §4(a), 122 Stat. 3553 (codified at 42 U.S.C. § 12102(3)).

54. *See supra* note 38 and accompanying text.

55. *See* *Kearins v. Vill. Creek of Eldorado Home Owners' Ass'n, Inc.*, No. 4:17-CV-00769, 2019 WL 2266635, at *10 n.1 (E.D. Tex. Mar. 5, 2019), *report and recommendation adopted*, No. 4:17-CV-00769, 2019 WL 1760521 (E.D. Tex. Apr. 22, 2019).

56. *See, e.g.,* *McFadden v. Meeker Hous. Auth.*, Civil Action No. 16-cv-2304-WJM-GPG, 23 (D. Colo. Feb. 15, 2019) (reasoning that "the Court is confident that Congress did not intend for the ADAAA to create two standards for disability (one for the ADA/§ 504, and another for the FHA). At a minimum, the ADAAA is strong evidence of Congress's intent as to the meaning of disability protections generally. Accordingly, the Court finds that the meaning of 'substantially limits' in the FHA should be interpreted congruent with the ADA/§ 504 definition of that term").

57. *See infra* Part III.

58. *See, e.g.,* *Matarese v. Archstone Pentagon City*, 795 F. Supp. 2d 402,432 (E.D. Va 2011) *aff'd in part, vacated in part sub nom. Matarese v. Archstone Cmtys., LLC*, 468 Fed. Appx. 283 (4th Cir. 2012) (citing pre-ADAAA cases requiring plaintiff to prove severe restriction of major life activities and permanent and long-term effect of impairment).

59. Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON

the courts are doing what Congress explicitly directed them not to do.⁶⁰ The FHA does not have similar clear direction, making it far less certain that housing discrimination plaintiffs will make it past the threshold consideration of whether they have a handicap.⁶¹ As discussed in Part III, courts have continued to apply standards the ADAAA rejected, effectively keeping the protected class narrow under the FHAA.

III. COURTS CONTINUE TO APPLY PRE-ADAAA STANDARDS TO FHAA, ESPECIALLY THE SEVERELY RESTRICTED AND LONG-TERM IMPACT THRESHOLDS.

An article written a few years after the ADAAA suggested that both the federal courts and HUD had generally incorporated the ADAAA's broader definition,⁶² but the more recent cases do not reflect that. The lack of definitional clarity under the FHAA poses the most potential for mischief regarding whether an impairment must be "permanent or long term,"⁶³ whether to take into account "measures that mitigate the individual's impairment,"⁶⁴ and how much evidence the plaintiff is required to produce to show an impairment that is substantially limiting.⁶⁵

The cases fall broadly into three categories: cases where the courts concluded pre-ADAAA law applies;⁶⁶ cases where courts either ignored or sidestepped the issue, generally in cases asserting overlapping ADA,

POVERTY L. & POL'Y 383, 392 (2019) (observing that while the number of cases where courts make errors in applying the definition of disability has significantly decreased, "[the number] is still a disheartening number"); Cheryl L. Anderson, *No Disability If You Recover: How the ADA Shortchanges Short-Term Impairments*, 59 SAN DIEGO L. REV. 63, 84–88 (2022) (discussing how courts fail to follow the ADAAA when evaluating the severity of limitations).

60. See generally Porter, *supra* note 59 (reviewing how courts are not following the directives set by the ADAAA).

61. See *infra* Part III.

62. Burnett & Poliakoff, *supra* note 6, at 462 ("In these authors' opinions, the courts interpreting the FHAA, HUD and its investigative agencies have been applying this broad definition of disability in the FHAA context.").

63. See *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 43 (2d Cir. 2015) (citing *Toyota Motor*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, § 2, Pub. L. No. 110-325, 122 Stat. 3553, 3554).

64. See *Rodriguez*, 788 F.3d at 43 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999), *superseded by statute*, § 4, 122 Stat. at 3556).

65. See *Peklun v. Tierra Del Mar Condo. Ass'n, Inc.*, No. 15-CIV-80801, 2015 WL 8029840, at *8–9 (S.D. Fla. Dec. 7, 2015).

66. See *Rodriguez*, 788 F.3d at 43; *Bhogaita v. Altamonte Heights Condo. Assn., Inc.*, No. 6:11-CV-1637-ORL, 2012 WL 6562766 (M.D. Fla. Dec. 17, 2012), *aff'd sub nom.* *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277 (11th Cir. 2014).

FHAA and § 504 claims;⁶⁷ and cases where the court identified a coextensive definition but then cited to shadow precedent.⁶⁸ Plaintiffs who allege non-apparent disabilities such as mental health issues or episodic impairments in particular struggle with courts applying shadow precedent, particularly regarding the amount of evidence they have to provide to meet the threshold of handicapped.⁶⁹

For example, in *Bhogaita v. Altamonte Heights Condo. Assn., Inc.*,⁷⁰ the plaintiff was a veteran with post-traumatic stress disorder (PTSD) who sought an accommodation for his physician-prescribed emotional support dog, which exceeded the condominium association's twenty-five pound limit.⁷¹ He alleged his PTSD substantially limited his ability to work.⁷² The association made multiple and increasingly intrusive requests that he provide detailed justification for the animal, including the specific disabilities he claimed, what specific medical treatment he was receiving, what professional training the animal had received, and why he needed a dog that exceeded the pound limit.⁷³ The Federal District Court for the Middle District of Florida refused to grant either party summary judgment on the question of whether the plaintiff had a handicap under the FHAA,⁷⁴ after rejecting the plaintiff's argument that "in amending the ADA, Congress impliedly amended the definition in the FHA," and therefore the three statutes should be interpreted *in pari materia*.⁷⁵

The court instead employed a textualist approach focused solely on the absence of direct language amending the FHAA, quoting prior Eleventh Circuit authority suggesting that "there are important differences among these statutes [and] the ADA and the RA may be broader than the FHA"⁷⁶ Citing to a shadow Supreme Court precedent under the

67. See, e.g., *Worthington v. Golden Oaks Apartments*, No. 3:11-CV-223 RM, 2011 WL 4729879, at * 5 (N.D. Ind. Oct. 4, 2011) (recognizing "that disagreement exists as to the amount of detail necessary to allege a disability claim" in case alleging ADA, FHA, and Rehabilitation Act claims without distinguishing between those claims at motion to dismiss stage).

68. See *Brady v. Evangelical Lutheran Good Samaritan Soc'y*, No. 4:22-CV-84123, 2023 WL 6393882 (E.D. Tex. Oct. 2, 2023) (allergies and auto-immune conditions are not handicaps).

69. See, e.g., *Bhogaita*, 2012 WL 6562766 (addressing claim by individual with PTSD seeking to have his emotional support animal in his condo).

70. *Id.*

71. *Id.* at *1.

72. *Id.* at *6.

73. *Id.* at *2–3. The first request asked general questions. The third request was for a sworn statement. See *id.*

74. *Bhogaita*, 2012 WL 6393882 at *6.

75. *Id.* at *5.

76. *Id.* (quoting *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 (11th Cir. 2008)).

ADAAA, in *Sutton v. United Air Lines, Inc.*,⁷⁷ the district court found there was an issue of fact regarding whether the plaintiff had sufficiently shown he was “unable to work in any job that requires significant interaction with other people.”⁷⁸ On appeal, the Eleventh Circuit implicitly approved the district court’s approach by suggesting it was looking to “the pre-ADAAA definition of ‘disability,’ a definition virtually identical to the FHA’s definition of ‘handicap’”⁷⁹

The Second Circuit in *Rodriguez v. Village Green Realty, Inc.* subsequently cited *Bhogaita* in a mother’s claim alleging housing discrimination based on her daughter’s epilepsy and autism.⁸⁰ The mother alleged these conditions affected her daughter’s ability to learn.⁸¹ The Second Circuit acknowledged the common origin and commonality of the language in each statute, but then reasoned that because the ADAAA amended the ADA but not the FHA, pre-ADAAA standards applied.⁸² The court therefore required the plaintiff to show that the child’s condition was both permanent and long-term and it considered the effects of the mitigating measures on her ability to learn when considering whether she had an actual disability.⁸³ The Eastern District of Virginia in *Matarese v.*

77. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999), *superseded by statute*, Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(3), (5), 122 Stat. 3553, 3554. *Sutton* was one of the Supreme Court decisions Congress identified in the ADAAA’s Findings and Purposes as incorrectly decided and expressed its intent to supersede. *See also* § 2(a)(4) (“[T]he holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”); *id.* § 2(b)(2) (stating one of the statute’s purposes was “to reject the requirement enunciated by the Supreme Court in *Sutton* . . . and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.”).

78. At trial, the jury found Bhogaita had presented sufficient evidence that he had a disability. *See Bhogaita v. Altamonte Heights Condo. Ass’n, Inc.*, 765 F.3d 1277, 1284 (11th Cir. 2014) (noting “the jury . . . found that Bhogaita was disabled and requested an accommodation for his disability, that the accommodation was necessary and reasonable, and that Bhogaita suffered damages because of the Association’s refusal to accommodate”).

79. *Id.* at 1288 (reasoning that “[we] apply the same interpretation here because of the similarity between the pre-amendment ADA and the FHA”). The Second Circuit subsequently cited the Eleventh Circuit’s decision with approval to conclude that pre-ADAAA standards apply in that circuit. *See Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 40 n.10 (2d Cir. 2015) (citing *Bhogaita*, 765 F.3d at 1288).

80. *Rodriguez*, 788 F.3d at 43 n.13.

81. *Id.* at 41. The plaintiff also alleged the defendant regarded her daughter as having a disability. *See id.*

82. *Id.* at 40 n.10.

83. *Id.* at 43. The district court had dismissed the claim because it found the plaintiff had failed to present “objective evidence” of the degree to which the child’s ability to learn

Archstone Pentagon City similarly refused to apply the ADAAA to an actual disability claim, instead citing pre-ADAAA cases setting a high bar for proving a handicap “substantially limits” a major life activity.⁸⁴ The court defined “substantially” to mean “considerable or to a large degree,” and indicated the impairment must be “permanent or long term,” not “sporadic or intermittent.”⁸⁵

The Southern District of New York rejected evidence in an FHA claim alleging several different impairments of major life activities by citing to superseded law requiring severe limitation and consideration of mitigating measures.⁸⁶ In *Mazzocchi v. Windsor Owners Corp.*,⁸⁷ the plaintiff alleged that a cooperative corporation and its property manager had discriminated against him based on his live-in girlfriend having bipolar disorder.⁸⁸ The court first rejected his claim that his girlfriend had a disability in her ability to think and concentrate because the court said there was insufficient evidence her mental impairment “prevent[s] or severely restrict[s]” or has a “permanent and long term impact” on those activities.⁸⁹ This was despite evidence that the girlfriend had been involuntarily hospitalized and prescribed medication for bipolar disorder, and that her boyfriend and others in the building described her as exhibiting “delusional beliefs, paranoia, and inappropriate conduct” along with an “inability to perform basic arithmetic, write above a kindergarten level, write a check, use a computer, prepare a budget, make change, or remember what she reads.”⁹⁰ The court called the evidence a “vague description,” citing pre-ADAAA

was affected or to resolve all ambiguities in her favor. *Rodriguez v. Vill. Green Realty, Inc.*, No. 1:11-CV-1068, 2013 WL 5592703, at *7 (N.D.N.Y. Oct. 10, 2013), *on reconsideration*, No. 1:11-CV-1068, 2013 WL 6058577 (N.D.N.Y. Nov. 15, 2013), *vacated and remanded*, 788 F.3d 31 (2d Cir. 2015). This was despite the extensive medical and non-medical information the plaintiff had submitted to describe the child’s experiences with her conditions. *See Rodriguez*, 788 F.3d at 42, 47–48. The Second Circuit found that the child’s individualized education plan (IEP), issued pursuant to the Individuals with Disabilities Education Act (IDEA), sufficiently detailed her educational impairments, and that there was additional testimony that she struggled notwithstanding that IEP. *See id.* at 44–45.

84. *Matarese v. Archstone Pentagon City*, 795 F. Supp. 2d 402,432 (E.D. Va 2011) *aff’d in part, vacated in part sub nom.* *Matarese v. Archstone Cmty., LLC*, 468 Fed. Appx. 283 (4th Cir. 2012) (citing several pre-ADAAA cases from the Fourth Circuit defining “substantially limited”).

85. *See id.*

86. *Mazzocchi v. Windsor Owners Corp.*, 204 F. Supp. 3d 583, 609–12 (S.D.N.Y. 2016).

87. *Id.*

88. *Id.* at 600–01, 609.

89. *Id.* at 610 (quoting *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 43 (2d Cir. 2015)).

90. *Id.*

precedent without textual explanation despite curiously acknowledging in its citation that the precedent was “superseded by statute.”⁹¹ The court similarly cited superseded law requiring courts to consider any mitigating measures the individual used to address the effects of the impairment.⁹²

Mazzocchi’s reasoning regarding the major life activity of interacting with others was particularly concerning because the court required the evidence to meet the Second Circuit’s pre-ADAAA standard that “the impairment [must] ‘severely limit[] the fundamental ability to communicate with others,’ *i.e.*, ‘to initiate contact with other people and respond to them, or to go among other people—at the most basic level of these activities.’”⁹³ “At the most basic level” invokes the “of central importance to daily lives” standard set by *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,⁹⁴ one of the Supreme Court decisions that Congress explicitly rejected in the ADAAA’s Findings and Purposes section.⁹⁵ Congress in effect recognized that an impairment can be substantially limiting well before it hits a “fundamental” level.⁹⁶

The Southern District of Florida found an issue of fact regarding whether a plaintiff’s sleep apnea substantially limited his ability to sleep,

91. *Id.* at 609. The court framed the legal analysis as follows: “A major life activity is ‘substantially limited’ if the impairment ‘prevent[s] or severely restrict[s]’ the major life activity and has a ‘permanent or long term’ impact.” *Rodriguez*, 788 F.3d at 43 (quoting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, Americans with Disabilities Act Amendments Act of 2008, § 4, Pub. L. No. 110-325, 122 Stat. 3553, 3554 (2008) (“ADAAA”)); *see also Rodriguez*, 788 F.3d at 45 (“[I]t is the impact of [the] impairment, not its most severe physical manifestations, that must be ‘permanent or long term.’”).

92. *Id.* The court framed this rule as follows: “Whether a major life activity is substantially limited requires ‘[a]n individualized assessment,’” *id.* at 43 (quoting *Toyota*, 534 U.S. at 199) and “must be evaluated ‘with reference to measures that mitigate the individual’s impairment,’” *id.* (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999), *superseded by statute*, ADAAA § 4).

93. *Mazzocchi*, 204 F. Supp. 3d at 611 (quoting *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir. 2004)).

94. 534 U.S. at 198, *superseded by statute*, Americans with Disabilities Act Amendments Act of 2008 § 4 (interpreting impairment of the major life activity of “performing manual tasks” to require evidence plaintiff was severely restricted “manual tasks of central importance to people’s daily lives” such as “household chores, bathing, and brushing one’s teeth”).

95. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554 (2008) (articulating Congress’s intent to reject *Toyota*’s “activities that are of central importance to most people’s daily lives” standard).

96. § 2(b)(5), 122 Stat. at 3554 (stating the ADAAA’s purpose was to reverse court decisions such as *Toyota* that had “created an inappropriately high level of limitation necessary to obtain coverage under the ADA” and articulating that “the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations”).

but only after it rejected his other claims based on heart disease, kidney disease, lung disease, anxiety, and depression because his doctor's letters inadequately detailed how his medical conditions inhibited any major life activities.⁹⁷ The court began its analysis by stating "[f]or all intents and purposes, the terms 'handicap' and 'disability' have the same legal meaning," but then cited multiple pre-ADAAA cases to find the plaintiff failed to create an issue of fact on actual disability.⁹⁸ The court found the plaintiff created a question of fact whether his sleep apnea substantially limited the major life activities of walking and sleeping only because the doctor's letter referenced "the danger of respiratory arrest and respiratory failure" and characterized the condition as "chronic," affecting his ability to ambulate as well as causing "excessive day-time drowsiness."⁹⁹

The courts in these cases did not recognize the ADAAA's admonition that most cases do not require substantial evidence regarding whether the plaintiff has a disability,¹⁰⁰ nor did they acknowledge that the ADAAA defines major life activity to include impairments of "major bodily functions."¹⁰¹ Courts applying the ADAAA have accepted doctor's letters with less detail than those rejected in the FHA cases.¹⁰²

Plaintiffs have faced similar difficulty under the "regarded as" prong. Pre-ADAAA, plaintiffs who alleged the defendant regarded them as having a disability had to show the perceived disability would substantially limit a major life activity.¹⁰³ Post-ADAAA, plaintiffs only

97. *Peklun v. Tierra Del Mar Condo. Ass'n, Inc.*, No. 15-CIV-80801, 2015 WL 8029840, at *8 (S.D. Fla. Dec. 7, 2015) (internal quotations and citations omitted). The plaintiff's claims were supported by doctors' letters that described his conditions, including how he was taking medication to control them and, in the case of his kidney disease, how the disease was causing fluid to build up in his body. *Id.* at *8. One of the letters indicated that the plaintiff was being seen on a regular basis by a cardiologist and that he suffered from "a severe hypertensive condition which has been shown to be causing severe end-organ damage like severe kidney dysfunction... and heart disease." *Id.* at *9. The court repeatedly stated that none of those doctor's opinions showed how any of the plaintiff's major life activities were limited. *Id.*

98. *Id.* at *8–9.

99. *Id.* at *9–10.

100. § 2(b)(5), 122 Stat. at 3554.

101. 42 U.S.C. § 12102(2)(B).

102. *See, e.g., Samuels v. Urb. Assembly Charter Sch. for Comput. Sci.*, No. 23-CV-1379 (RA), 2024 WL 4008165, at *5 (S.D.N.Y. Aug. 30, 2024) (finding plaintiff stated an ADA claim despite the fact that the doctor's note "fail[ed] to provide a medical diagnosis or identify a specific disability"); *see also Vanhorn v. Hana Grp., Inc.*, 979 F. Supp. 2d 1083, 1092 (D. Haw. 2013) (reasoning that "[a]lthough Defendant may have prevailed on this claim under an earlier version of the ADA," evidence including the plaintiff's medical provider recommending she "sit and/or 'take it easy'" at work was sufficient to withstand summary judgment).

103. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999), *superseded by statute*, §§ 2(b)(3), (5), 122 Stat. at 3554.

need to show the defendant perceived them as having an impairment.¹⁰⁴ The ADAAA, however, eliminated the ability to seek reasonable accommodation if the plaintiff relies only on the “regarded as” prong.¹⁰⁵ Although FHA cases continue to require plaintiffs to show the defendant regarded them as having a substantially limiting impairment, in a few cases, this prong is how plaintiffs have kept their claims alive.¹⁰⁶ For example, after the plaintiff in *Mazzocchi* failed to persuade the court his girlfriend had an actual disability, the court found he had created an issue of fact on a “regarded as” claim, but only because the court found the Co-op Board explicitly referred to his girlfriend as having a mental impairment while discussing the delusional and inappropriate conduct the court previously rejected as insufficient to show actual disability.¹⁰⁷ *Rodriguez* also found the plaintiff had created an issue of fact regarding whether the housing provider had regarded her as having a disability, but only after closely examining the evidence presented to determine if it met pre-ADAAA standards regarding what is “substantially limiting.”¹⁰⁸ The plaintiff alleged impairments to her ability to learn and to obtain housing, and the court defined the evidence needed to prove substantial impairment of obtaining housing this way:

We note that a person is not substantially limited in the major life activity of obtaining housing simply because she is unable to, or regarded as unable to, live in a particular dwelling. Rather, a person is substantially limited if, due to her impairment, she cannot live or is regarded as unable to live in a broad class of housing that would otherwise be accessible to her.¹⁰⁹

Thus, while the plaintiff’s case survived the motion for summary judgment, it was only after the court required the plaintiff to present

104. 42 U.S.C. § 12102(3)(A).

105. *Id.* § 12201(h).

106. *See, e.g., Mazzocchi v. Windsor Owners Corp.*, 204 F. Supp. 3d 583, 613 (S.D.N.Y. 2016) (“In either situation, the plaintiff must show that ‘defendants perceived [the plaintiff’s] impairment as substantially limiting the exercise of a major life activity.’” (internal citations omitted)).

107. *Id.* (describing meeting participants as “g[iving] detailed accounts of what they perceived to be Doe’s inappropriate, erratic, and delusional behavior”). The court in *Mazzocchi* did not find in the plaintiff’s favor; it merely found a reasonable jury could do so. *Id.* at 614–15. This would mean the plaintiff still has to present evidence of disability at trial, which conflicts with the ADAAA’s admonition that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” *See* § 2(b)(5), 122 Stat. at 3554.

108. *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 49–51 (2d Cir. 2015).

109. *Id.* at 50.

considerable evidence to show the housing provider regarded her as having a disability.¹¹⁰

Even when a court looks to the ADAAA, it may still apply pre-ADAAA reasoning. For example, the Eastern District of Texas reasoned that the ADA and FHA apply the same standards and acknowledged that after the ADAAA, the Fifth Circuit had rejected its prior position that impairments must be permanent or long term.¹¹¹ Despite that, the court cited a stream of allergy cases that either use pre-ADAAA standards such as *Sutton's* mitigating measures rule or that do not support a general rule that allergies and autoimmune conditions are not disabilities in any case.¹¹² In other cases, the court does not cite any authority to find the plaintiff has failed to sufficiently plead handicap.¹¹³ The Fourth Circuit reached that conclusion while noting that a *pro se* plaintiff had alleged she “received care from a behavioral health organization, she had an appointment with a doctor, and she was on medication.”¹¹⁴ Without citing any part of the FHAA’s definition or any cases interpreting it, the court said that while her complaint “specifies her mental illness as a mood disorder[, t]his evidence, though, does not suggest that her mental illness is a handicap covered by the FHA.”¹¹⁵

IV. THERE ARE NO DIFFERENCES BETWEEN THE STATUTES SUGGESTING CONGRESS INTENDED THE FHAA’S DEFINITION OF HANDICAP TO BE LESS PROTECTIVE THAN THE ADA AND § 504.

As noted above, at least one court dismissed concern that the FHA’s definition of disability is no longer coextensive with that of the ADA or § 504 because “there are important differences” between the three statutes and the ADA and the Rehabilitation Act “may be broader than the

110. *See id.*

111. *Brady v. Evangelical Lutheran Good Samaritan Society*, No. 4:22-CV-841-CDJ, 2023 WL 6393882, at *4, *10 n.1 (E.D. Tex. Oct. 2, 2023) (citing *Mueck v. La Grange Acquisitions, L.P.*, 75 F.4th 469, 479–80 (5th Cir. 2023), as revised (Aug. 4, 2023)).

112. *See Brady*, 2023 WL 6393882, at *5.

113. *E.g.*, *Thomas v. The Salvation Army S. Territory*, 841 F.3d 632, 639 (4th Cir. 2016).

114. *Id.*

115. *Id.* The Fourth Circuit’s ruling stands in contrast to other cases in which the courts have said that plaintiffs do not need to allege a specific major life activity at the pleading stage. The Eastern District of Indiana found a plaintiff had sufficiently alleged ADA, Rehabilitation Act, and FHA claims when her complaint stated she was “a ‘qualified individual with a handicap’ and a ‘qualified individual with a disability’ who ‘has limitations to major life activities as a result of arthritis and auto-immune disease.’” *Worthington v. Golden Oaks Apartment*, No. 3:11-CV-223 RM, 2011 WL 4729879, at *5 (N.D. Ind. Oct. 4, 2011).

FHA.”¹¹⁶ In other words, the court suggested Congress may have intended the latter statutes to have a broader protected class.¹¹⁷ But is there any reason Congress would have intended that? The court dismissing the concern did not provide any substantive explanation.¹¹⁸

When the Supreme Court refused to apply the mixed-motive proof model codified by the Civil Rights Act of 1991¹¹⁹ to the retaliation provisions of Title VII¹²⁰ absent explicit statutory direction, the Court went into some detail about why extending that proof model to retaliation claims had distinct negative consequences that it did not think Congress intended to encourage.¹²¹ Specifically, the Court suggested extending the mixed-motive proof model would prompt employees who are about to be fired or suffer some other adverse employment action to file frivolous retaliation claims before that action occurs and then take advantage of the lesser standard of proof available for retaliation claims to survive summary judgment.¹²² There is no similar cause and effect problem with the three disability discrimination statutes when they substantively prohibit similar discriminatory conduct.¹²³ Conversely, there does not seem to be any reason Congress would have intended the ADAAA steer plaintiffs to either the ADA or Rehabilitation Act instead of the FHA if there is substantive overlap, especially if the court cited above is correct that the ADA and Rehabilitation Acts are broader than the FHA.¹⁷

Moreover, it is not always true that the ADA and § 504’s substantive protections are broader than the FHA’s. For example, the FHA requires providers to accept reasonable accommodation requests for emotional support animals in appropriate circumstances whereas the ADA is limited to service animals (dogs or miniature horses).¹²⁴ Regardless, the primary

116. See *Bhogaita v. Altamonte Heights Condo. Assn., Inc.*, No. 6:11-CV-1637-ORL, 2012 WL 6562766, at *5 (M.D. Fla. Dec. 17, 2012), *aff’d sub nom.* *Bhogaita v. Altamonte Heights Condo. Ass’n, Inc.*, 765 F.3d 1277 (11th Cir. 2014) (reasoning based on Eleventh Circuit precedent that “there are important differences among these statutes” and “the ADA and the RA may be broader than the FHA” (quoting *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n. 6 (11th Cir. 2008)); see also *supra* note 17 and accompanying text.

117. See *Bhogaita*, 2012 WL 6562766, at *5.

118. The court in *Bhogaita* does not acknowledge that *Schwarz* was addressing the scope of the prohibition on intentional discrimination in regard to “dwellings,” a term that does not appear in the ADA or § 504. See *Schwarz*, 544 F.3d at 1212 n.6.

119. Pub. L. No. 102-166, § 107, 105 Stat 1071 (1991) (codified at 42 U.S.C. §§ 2000e–(2)(m), 2000e–5(g)).

120. 42 U.S.C. § 2000e–(3).

121. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 358 (2013).

122. See *id.*

123. See *supra* notes 23–25 and accompanying text.

124. As the Department of Justice explained in conjunction with the 2010 rule that limited accommodations under titles II and III of the ADA to service dogs and service miniature horses:

legal right at issue, namely the right not to be discriminated against based on denial of reasonable accommodation, is the same. The FHA's fundamental premise is that individuals should be free from discrimination in their right to live in the residence and community of their choice.¹²⁵ The FHAA established that reasonable accommodation of an individual's disability is necessary to secure that right.¹²⁶ Recognizing the same expansive protected class under all three statutes would not adversely affect any substantial purpose of nondiscrimination laws.

In fact, continuing to recognize a coextensive definition would prevent the situation where the law applies broader definitional standards to public housing subject to both Title II and the Rehabilitation Act than it does to private landlords under the FHA.¹²⁷ If there had been any reason to make such a distinction, it would have existed in 1988 when Congress adopted the Rehabilitation Act's definition of handicap in the FHAA. Instead, Title

Although in many cases similar provisions of different statutes are interpreted to impose similar requirements, there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity, or because of distinctions between the statutes. For example, emotional support animals that do not qualify as service animals under the Department's title III regulations may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the [FHA] . . . The Department recognizes that there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities.

Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56240 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 36); see also Christopher Ligatti, *Courting Confusion: How State Laws Regulating Emotional Support Animals in Housing Add to Public Confusion, Stigmatize Emotional Support Animal Users, and Increase the Risk of Fair Housing Act Liability*, 29 TEX. J. C.L. & C.R. 1, 12–14 (2023) (discussing how "[r]easonable accommodations to 'no pet' policies for emotional support animals have been accepted by courts since the 1970s" and that narrowing the ADA to cover only service animals has created confusion between the two statutes).

125. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir.1994), *aff'd*, 514 U.S. 725 (1995) ("Congress intended the FHAA to protect the right of handicapped persons to live in the residence of their choice in the community.").

126. See, e.g., *Smith & Lee Assocs., Inc. v. City of Taylor, Mich.*, 102 F.3d 781, 795 (6th Cir. 1996) (reasoning that elderly disabled citizens have a right to live in single-family neighborhoods and that "to avail themselves of this right," they needed accommodation of city's limitations on multi-resident housing).

127. Cf. generally *Poole v. Hous. Auth. for the Town of Vinton*, 202 F. Supp. 3d 617, 626 (W.D. La. 2016) (evaluating discriminatory lease provision in public housing claim utilizing similar standards for the ADA and the Rehabilitation Act claims).

II, as well as the FHA, broadly prohibit discriminatory conduct by public entities and private entities, respectively, using similar standards.¹²⁸

To a certain extent, the problems in the FHA decisions mirror problems seen in ADA decisions both before and after the ADAAA. As noted above, courts continue to misapply the ADA even after the ADAAA.¹²⁹ They treat shadow precedent as having established generally applicable rules that somehow survived the ADAAA.¹³⁰ They do not heed Congress's admonition in the ADAAA to focus on the merits and not the definitional threshold.¹³¹ The FHA's lack of clarity feeds into a larger problem with judicial resistance to expansive civil rights protections for individuals with impairments that require reasonable accommodation.¹³² But parties seeking to enforce their rights under the ADA or § 504 at least have explicit statutory language rejecting those prior decisions.¹³³ FHA plaintiffs face less certainty regarding whether they will be able to convince a court to recognize their disability. And commonly, what FHA plaintiffs seek is to avoid loss of housing.¹³⁴ Being denied access to employment is a terrible thing; being deprived of a place to live can be a catastrophe.¹³⁵ As the Fourth Circuit has observed, "housing discrimination causes a uniquely immediate injury."¹³⁶

The definitional disconnect in the FHA leads plaintiffs' lawyers to plead handicap in the awkward way reflected in pre-ADAAA cases.¹³⁷ The FHA cases include situations where plaintiffs seeking housing

128. See *id.* (articulating the same three elements to prove both an ADA and Rehabilitation Act claim). ADA Title II broadly states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

129. See Porter, *supra* note 59 and accompanying text.

130. Widiss, *supra* note 16, at 941 (discussing how "a significant number of decisions . . . acknowledged in some way that the ADAAA had been enacted, but nonetheless applied pre-ADAAA case law in contexts where it had clearly been superseded").

131. 42 U.S.C. § 12102(b)(5).

132. See Porter, *supra* note 59, at 411–12 (suggesting possibility of a second backlash against the breadth of the ADA's protected class after the ADAAA).

133. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3553–54 (2008) (rejecting analysis in specified Supreme Court decisions).

134. See, e.g., *Mazzocchi v. Windsor Owners Corp.*, 204 F. Supp. 3d 583, 609–12 (S.D.N.Y. 2016) (alleging cooperative board sought to evict plaintiff because of live-in girlfriend's mental disorder).

135. Cf. *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) ("The inability to obtain an apartment is, we feel, on a par with the inability to obtain a job.").

136. See *Groome Res. Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 200 (5th Cir. 2000) (internal quotation omitted) (holding FHA cases are ripe for judicial consideration upon the provider's denial of an accommodation request).

137. See *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (person seeking services from a dentist alleged a limitation in her ability to reproduce).

accommodations end up alleging substantial limitation in their ability to learn or to work.¹³⁸ The EEOC has suggested that working is the major life activity of last resort, and the evidence required to establish it is more onerous than for other major life activities.¹³⁹ The ADAAA did not change that, but post-ADAAA cases reflect plaintiffs have had more success alleging other major life activities and may thus rely less on the working category.¹⁴⁰ FHA plaintiffs should have a similar opportunity. Because courts so far have accepted “obtaining housing” as a major life activity,¹⁴¹ FHA plaintiffs should find it easier to prove how their impairments limit their access to housing if the FHAA’s definition of “handicap” is coextensive with the ADAAA’s expansive standards.

V. CONGRESS’S EXPRESSED INTENT IN THE ADAAA TO “RESTORE” THE ADA TO THE REHABILITATION ACT’S ORIGINAL DEFINITION OF DISABILITY PROVIDES A TEXTUAL BASIS TO APPLY THE SAME DEFINITION STANDARDS TO THE FHAA.

Contrary to courts that have suggested the ADAAA expresses no congressional intent that the same standards apply to the FHAA, there are in fact two textual expressions of Congress’ recognition that the standards are coextensive. First, the ADAAA’s Findings and Purposes reflect that Congress believed there is a coextensive statutory definition of disability that arises out of the Rehabilitation Act.¹⁴² Congress stated in the

138. See, e.g., *Bhogaita v. Altamonte Heights Condo. Ass’n, Inc.*, 765 F.3d 1277, 1287 (11th Cir. 2014) (plaintiff alleging discriminatory refusal to allow his emotional support dog identified working as the major life activity his mental health impairment substantially limited); *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 41 (2d Cir. 2015) (plaintiffs alleged a realty office and realtor discriminated against family of child with epilepsy in refusing to provide housing by asserting epilepsy substantially impaired the child’s ability to learn).

139. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-M1A, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 2.1(A)(III) (1992) (detailing the additional evidence to show substantial limitation in working, including a requirement that “[t]he person must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes, compared to an average person with similar training, skills, and abilities”).

140. See *Porter*, *supra* note 59, at 392 (discussing how ADAAA cases showed improvement in number that survive summary judgment on the issue of disability); *id.* at 398–99 (discussing how relying on working was the impaired major life activity was “a very common mistake” made by plaintiffs’ lawyers).

141. See *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (“The inability to obtain an apartment is, we feel, on a par with the inability to obtain a job.”); see also *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 49–51 (2d Cir. 2015) (agreeing with the Fourth Circuit’s analysis).

142. See *Americans with Disabilities Act Amendments Act of 2008*, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3553 (2008) (articulating how Congress had intended

ADAAA's Findings section that it had "expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973," but "that expectation ha[d] not been fulfilled."¹⁴³ Congress then specifically rejected certain Supreme Court decisions as having misconstrued that law.¹⁴⁴ The Supreme Court has considered the ADA's Findings and Purposes instructive as to Congress's intent, including specific to the definition of disability.¹⁴⁵ In *Sutton v. United Airlines, Inc.*,¹⁴⁶ the Supreme Court characterized Congress's finding that "some 43,000,000 Americans have one or more physical or mental disabilities" as "critically" important in determining that Congress did not intend to cover individuals who wear ordinary eyeglasses as having a disability.¹⁴⁷

Second, Congress also stated the overarching purpose of the ADAAA is "[t]o restore the intent and protections of the Americans with Disabilities Act of 1990."¹⁴⁸ In other contexts, the Court has considered the restorative purpose of a statute relevant to its intended applicability.¹⁴⁹ The statement

"disability" in the ADA to be interpreted consistent with the existing definition under the Rehabilitation Act).

143. *Id.*

144. *Id.* § 2(b)(2)–(3) (rejecting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (2009)); § 2(b)(4)–(5) (rejecting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002)).

145. *Sutton*, 527 U.S. at 472, *superseded by statute*, § 2(b)(3), (5), 122 Stat. 3553, 3554.

146. *Sutton*, 527 U.S. at 472.

147. *Id.* ("Finally, and critically, the congressional finding that 43 million Americans have one or more physical or mental disabilities, see § 12101(a)(1), requires the conclusion that Congress did not intend to bring under the ADA's protection all those whose uncorrected conditions amount to disabilities."). The Court suggested that if such individuals were covered under the ADA, it would amount to more than 160 million people. *Id.*

148. Americans with Disabilities Act Amendments Act of 2008 (title).

149. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 305, 311 (1994) ("A lack of clear congressional intent would not be dispositive if, as petitioners argue, [the provision] is the kind of restorative statute that should presumptively be applied to pending cases."). *Rivers* considered whether a change by the Civil Right Act of 1991 to 42 U.S.C. § 1981 applied retroactively. *See id.* at 300 (discussing § 101 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071 (1991), which defined the term "make and enforce contracts" in § 1981 to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," which overruled *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)); *see id.* at 311 (concluding that the 1991 Civil Rights Act lacked "clear evidence" of such intent. In that case and the decision it relied upon, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the plaintiffs tried to create evidence of retroactivity by "negative implication" from the fact that some sections of that Act stated they applied only prospectively); *See Landgraf*, 511 U.S. at 258 (describing plaintiff as asserting that subsections when read "together create a strong negative inference that all sections of the Act not specifically declared prospective apply to pending cases that arose before [the

of restorative purpose along with the finding that Congress understood the ADA to incorporate standards already established under § 504 provide a textual basis for Congress's intent that the ADAAA's standards apply under any statute that incorporates the Rehabilitation Act's definition. Congress stated that the ADAAA's lower definitional thresholds were what § 504 meant and what the cases should have produced if § 504 standards were properly applied. The ADA decisions that the Court explicitly rejects in the ADAAA's Findings and Purposes section were wrong from their inception and should have no continuing persuasive force for interpreting any statute based on the Rehabilitation Act's definition.

The cases applying pre-2008 ADA standards to the FHAA do not at any point discuss these statements of congressional intent.¹⁵⁰ For example, the district court in *Bhogaita* frames the question as "whether the amendment of one statute bears on the interpretation of another statute not similarly amended," to which it applied bottom line reasoning that "[a]bsent persuasive evidence to the contrary, the Court must presume that Congress 'means in a statute what it says there.'"¹⁵¹ The court does not address whether there may be persuasive evidence to the contrary because Congress tells us why it amended the ADA.

The Supreme Court's decisions in a pair of cases interpreting the Civil Rights Act of 1991 ("1991 Civil Rights Act")¹⁵² do not call for a contrary conclusion. In those two cases, the Supreme Court ignored the interrelationship between discrimination statutes to insist on explicit

effective date of the statute]"); *Rivers*, 511 U.S. at 303 (reasoning that "these petitioners, like the petitioner in *Landgraf*, rely heavily on a negative implication argument [but t]hat argument . . . is no more persuasive [in this context]"); see Civil Rights Act of 1991 §§ 2, 3. There were no congressional findings similar to the ADAAA's about what Congress intended the original statute to mean. *Id.*

150. See *Bhogaita v. Altamonte Heights Condo. Assn., Inc.*, No. 6:11-CV-1637-ORL, 2012 WL 6562766, at *5 (M.D. Fla. Dec. 17, 2012), *aff'd sub nom.* *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277 (11th Cir. 2014); *Cf. McKivitz v. Twp. of Stowe*, 769 F. Supp. 2d 803, 821 (W.D. Pa. 2010) (declining to determine whether the definitions under the ADA, FHAA and Rehabilitation Act diverge after the ADAAA solely because the acts at issue occurred prior to enactment of the ADAAA).

151. *Id.* (quoting the plaintiff as arguing that Congress impliedly amended the FHAA because "[i]n amending the ADA, Congress sought to clarify its [definition] of 'handicapped individual' so [that] the interpretation would be consistent with the definition as intended prior to the ADA, under the RA." The court summarily dismissed that argument on the grounds that there was "no legal authority for [plaintiff's] proposition that the amendment of one statute bears on the interpretation of another statute not similarly amended").

152. 105 Stat 1071.

language amending related statutes.¹⁵³ Those statutory provisions, however, did not involve the kind of relationship that exists between the ADA, FHAA, and the Rehabilitation Act regarding the definition of disability. The Court in *Gross v. FBL Financial, Inc.*,¹⁵⁴ held that when Congress amended § 703 of the Civil Rights Act of 1964 to incorporate a “motivating factor” standard to prove unlawful discrimination, it did not intend that the same proof standard also be available to plaintiffs under the Age Discrimination in Employment Act (ADEA).¹⁵⁵ Subsequently, the Court held in *University of Texas Southwestern Medical Center v. Nassar*¹⁵⁶ that within Title VII itself, the 1991 Civil Rights Act did not reflect Congress’s intent that the motivating factor standards amending § 703 also apply to the antiretaliation provisions in § 704.¹⁵⁷ In both cases, the Court emphasized the absence of any language in the statute indicating Congress’s intent that those subsections apply beyond the plain text of the statute.¹⁵⁸ The Court also pointed out that while the relevant portion of the 1991 Civil Rights Act textually amended only § 703 of Civil Rights Act of 1964, other portions amended either the ADEA or § 704.¹⁵⁹ The latter point in particular was the context for *Gross*’s assertion that “[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”¹⁶⁰ As the Court explained, the “negative implications raised by disparate provisions are strongest when the provisions were

153. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (declining to apply the mixed-motive “motivating factor” proof model codified by the Civil Rights Act of 1991 to the Age Discrimination in Employment Act); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 356 (2013) (refusing to apply the motivating factor standard to retaliation claims brought under § 704 of the Civil Rights Act of 1964).

154. *Gross*, 557 U.S. at 167.

155. *Id.* at 174–75 (refusing to apply the mixed-motive “motivating factor” proof model to the Age Discrimination in Employment Act because 1991 Civil Rights Act did not reference the ADEA in the relevant portion of the Act).

156. *Nassar*, 570 U.S. at 338.

157. *Id.* at 356. *Nassar* involved intra-statute interpretation and why the detailed substantive schemes set out separately by § 703 and § 704 argued against reading § 704 to include standards articulated in the new § 703. *See id.* (“This fundamental difference in statutory structure renders inapposite decisions which treated retaliation as an implicit corollary of status-based discrimination.”).

158. *See Gross*, 557 U.S. at 174; *Nassar*, 570 U.S. at 350–51.

159. *See Nassar*, 570 U.S. at 350–51 (noting that “[i]n particular, the Court [in *Gross*] stressed the congressional choice not to add a provision like § 2000e–2(m) to the ADEA despite making numerous other changes to the latter statute in the 1991 [Civil Rights] Act”); *id.* at 353–54 (noting that § 109 of the 1991 Civil Rights Act also expressly amended § 704: “any practice prohibited by section 703 or 704”).

160. *Gross*, 557 U.S. at 174.

considered simultaneously when the language raising the implication was inserted."¹⁶¹

There is, however, no similar negative implication as related to the ADAAA. There is, rather, a positive implication set forth by the ADAAA's Findings and Purposes section that Congress had previously created a coextensive definition based in the Rehabilitation Act and was restoring the statute to that coextensive definition after the judiciary deviated from it.¹⁶²

Further, the 1991 Civil Rights Act was not merely restorative, and the Court found the amendments were not "an organic part" of the original Title VII.¹⁶³ Congress described the 1991 Civil Rights Act as "[a]n act to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes."¹⁶⁴ Congress amended § 703 to establish that a plaintiff proves an unlawful employment practice occurred once the plaintiff shows race, sex, color, religion, or national origin motivated the employer's adverse decision.¹⁶⁵ At that point, the burden of proof shifts to the employer to demonstrate that it would have made the same decision even if it had not taken the improper characteristic into account.¹⁶⁶ The plaintiff is then limited to equitable and declarative relief.¹⁶⁷ The mixed-motive proof model had previously been the subject of a fractured decision in *Price Waterhouse v. Hopkins*, in which a plurality of the court adopted the motivating factor standard and shifted a burden of proof to the employer but denied all relief if the employer met its burden.¹⁶⁸ The 1991 Civil Rights Act adopted the plurality's motivating factor standard but rejected its articulation of what happens when the

161. *See id.* at 175 (internal quotation omitted).

162. There is also no similar concern as expressed in *Nassar* about whether extending the motivating factor test to retaliation claims might lead to excessive resources being diverted to retaliation cases rather than combatting workplace harassment under Title VII. *See Nassar*, 570 U.S. at 358 (noting that retaliation claims "are being made with ever-increasing frequency" and had "nearly doubled in the past 15 years," and expressing fear that employees will file frivolous retaliation claims to avoid getting fired).

163. *See Nassar*, 570 U.S. at 351.

164. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat 1071 (1991).

165. 42 U.S.C. § 2000e-2(m).

166. *Id.* § 2000e-5(g)(2)(B).

167. *See id.*

168. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (concluding that "the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive").

employer meets its burden.¹⁶⁹ In other words, it created a new proof model that did not exist previously without stating it was “restoring” the law to what it had expected courts would interpret it to mean. The Supreme Court identified this “careful tailoring of the ‘motivating factor’ claim,” as “indicat[ing] that the motivating-factor standard was not an organic part of Title VII and thus could not be read into the ADEA.”¹⁷⁰ The ADAAA, by contrast, is Congress’s effort to return the statute to its organic state based on the Rehabilitation Act.

At the heart of *Gross* and *Nassar* is the Court’s objection to changing “ordinary default rules” of proof long engrained in the American system of litigation.¹⁷¹ The Court insists it must assume Congress intended the ordinary meaning of the causation words used in each of these statutes,¹⁷² and the Court may vary from that default meaning only when Congress explicitly indicates it intended a different meaning.¹⁷³ But there are no engrained rules regarding the definition of disability outside of statutory creation, and if there is any default rule, it was the Rehabilitation Act’s definition. Unlike the 1991 Civil Rights Act, the ADAAA is not silent; it states Congress’s intent in the Findings and Purposes section to restore the statute to its organic meaning based on the Rehabilitation Act. Because

169. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–95 (2003) (describing how the 1991 Civil Rights Act responded to *Price Waterhouse*).

170. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 351 (2013) (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178 n.5 (2009)) (describing *Gross* as reasoning that a different reading of the ADEA was required “because Congress’ 1991 amendments to Title VII, including its ‘careful tailoring of the “motivating factor” claim’ and the substitution of § 2000e–5(g)(2)(B) for *Price Waterhouse*’s full affirmative defense, indicated that the motivating-factor standard was not an organic part of Title VII”); *Gross*, 557 U.S. at 178 n.5 (“Congress’[s] careful tailoring of the ‘motivating factor’ claim in Title VII, as well as the absence of a provision parallel to § 2000e–2(m) in the ADEA, confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework into the ADEA.”).

171. See, e.g., *Gross*, 557 U.S. at 177 (articulating that there are “ordinary default rule[s]” as to allocation of burdens of proof (internal quotation omitted)); *Nassar*, 570 U.S. at 350 (summarizing *Gross*’s reasoning regarding the “ordinary” meaning of words).

172. The Court in *Gross* cited a dictionary definition of the phrase “because of” for what it concluded the phrase ordinarily means. See *Gross*, 557 U.S. at 176 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)); OXFORD ENGLISH DICTIONARY 746 (1st ed.1933), and THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1966)).

173. See *Gross*, 557 U.S. at 177 (noting that the default rule applies when the statutory text is silent). Professor Sandra Sperino has proposed that the Court was in fact creating a new canon of statutory construction, which she calls the “causation canon.” Sandra F. Sperino, *The Causation Canon*, 108 IOWA L. REV. 703, 719 (2023) (describing “the Court [as having] created a default canon that is the starting point for factual cause analysis for all statutes [that] presume[s] that a statute requires a plaintiff to establish ‘but-for’ cause, unless the statutory language shows that it does not “follow[] the general rule.” (citing *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020))).

Congress has indicated the judicial interpretation of “disability” took the statute away from the original, coextensive definition, the “ordinary default” should again be a coextensive definition. This puts the FHAA and the ADA in line with what the Supreme Court said pre-*Gross* about reading statutes that share a similar source:

Since the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace, since the language of § 14(b) is almost *in haec verba* with § 706(c), and since the legislative history of § 14(b) indicates that its source was § 706(c), we may properly conclude that Congress intended that the construction of § 14(b) should follow that of § 706(c).¹⁷⁴

As a final note, the ADAAA’s apparent lack of retroactivity does not change this analysis. Most lower courts have found that the ADAAA does not apply to conduct that occurred prior to its effective date, January 1, 2009.¹⁷⁵ Some of those courts have also recognized, however, that “a ‘restorative purpose may be relevant’ to the retroactivity question,” and that the ADAAA’s title as well as its Findings & Purposes section reflect a restorative intent.¹⁷⁶ While retroactivity generally concerns whether to apply the ADAAA to conduct that occurred prior to January 1, 2009,¹⁷⁷ the question this paper addresses is whether the FHAA shares a coextensive definition with its source statute. As discussed above, the ADAAA’s Findings and Purposes section states that courts were not following the Rehabilitation Act’s definition.¹⁷⁸ FHAA decisions incorporated the now-rejected ADA precedent because they read the three statutes as having the same legal standards (i.e., being coextensive), but those standards emanate from the Rehabilitation Act, not the ADA. Rather

174. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

175. Widiss, *supra* note 16, at 931 (2015) (observing that “statutory overrides, like statutes more generally, are typically deemed to be prospective rather than retroactive[, and c]ourts have consistently held that factual disputes that arose before [the effective] date should be resolved under the ADA as it was interpreted prior to the ADAAA”).

176. *See Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir. 2009) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 305, 311 (1994)). *Lytes* ultimately concluded that the restorative intent was “time neutral” and did not require applying the statute to already completed conduct. *See id.*

177. *See, e.g., Reynolds v. Am. Nat. Red Cross*, 701 F.3d 143, 150 (4th Cir. 2012) (“Given that Reynolds’s alleged disability occurred in 2006, in deciding whether Reynolds produced sufficient evidence of a disability, we must first decide whether to apply retroactively the ADA Amendments Act of 2008 (the ‘ADAAA’), which took effect January 1, 2009.”).

178. *See ADA Amendments Act of 2008*, Pub. L. No. 110-325, § 2(a)(3), 122 Stat. 3553, 3554 (2008); *see also supra* notes 143–46 and accompanying text.

than a question of retroactivity, the FHAA question is what the law meant at its inception. Those courts that insist on applying old ADA standards are misinterpreting the FHAA as it has existed since it was enacted in 1988.

VI. CONCLUSION

The FHAA's definition of "handicap" seems to have flown under the radar in the post-ADAAA era. Housing discrimination plaintiffs continue to face the stiff definitional headwinds that ADA and Rehabilitation Act plaintiffs faced prior to 2009. Given housing discrimination's "uniquely immediate injury,"¹⁷⁹ there is no defensible reason to presume without evidence that Congress intended for courts to continue to apply pre-ADAAA standards to those claims but not to other disability discrimination claims. These three statutes have a unique relationship regarding their definitional threshold. If courts were wrong from the inception to strictly interpret "disability" under the ADA because they did not follow Congress's understanding of the Rehabilitation Act, then they were similarly wrong to strictly interpret "handicap" under the FHAA, a statute that incorporates the Rehabilitation Act's definition. Courts can and should recognize the ADAAA's restorative purpose extends to all related statutes that arise from the same source.

Ultimately, however, regardless of the strength of arguments that courts are being hyper-textualist, Congress should make it a non-issue. The drafting task here is not onerous. It would be sufficient to add language to the FHAA stating that the standards used to determine "handicap" under that statute shall be the same as those used in the ADA and the Rehabilitation Act.¹⁸⁰ Congress further should make broad

179. See *Groome Res. Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 200 (5th Cir. 2000) (internal quotation omitted) (describing housing discrimination's "uniquely immediate injury").

180. The proposed text is narrower than the existing provisions reconciling the ADA with the Rehabilitation Act because of the degree of substantive overlap between the ADA and the Rehabilitation Act. The Rehabilitation Act reconciles itself with Title I of the ADA regarding employment discrimination. See 29 U.S.C. § 794(d) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq.*)"). Title II of the ADA reconciles itself with the Rehabilitation Act regarding the programs, services, and activities of public entities. See 42 U.S.C. § 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title."). It is beyond the scope of this paper whether the FHAA should be amended to add language more broadly reconciling

reconciling language a standard part of all related anti-discrimination statutes and acts amending them, thereby forestalling courts from denying the expansive intended coverage of statutory civil rights protections.

the substantive standards for housing discrimination to the extent such discrimination is also covered under the ADA and Rehabilitation Act.