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Unfit to Be Seen: Customer Preferences and the Americans with Disabilities Act

Craig Westergard

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ABSTRACT

Disability discrimination is a persistent and pervasive problem. Its history in the United States stretches from the "ugly laws" of the late-1800s to modern-day employment discrimination. In general, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against disabled employees and job applicants. Employers often disregard this law, however, in order to cater to the untoward preferences of their customers. In theory, customer preferences are not a defense to discrimination, unless they pertain to safety, privacy, or authenticity. In practice, however, many courts seem to recognize an unseemly fourth exception to the general rule against customer preference-based defenses. This occurs when disabled persons are deemed "unfit to be seen."

This Note first chronicles the history of the ADA and the economic and psychological realities of customer preference-based defenses. It then describes instances in which the "unfit to be seen" strain of the defense has been recognized by courts and analyzes its legitimacy. This Note concludes that the defense is contrary to the text of the ADA, the intentions of the legislature, and the ADA's underlying policies. As such, Congress and the judiciary should act to repudiate it. In the alternative, this Note proposes standards that courts should consider in evaluating customer preference-based defenses to disability discrimination.

I. INTRODUCTION

Persons with disabilities have long been discriminated against by society in general and by employers specifically.[1] In 1990, Congress

1. This Note uses the terms "persons with disabilities," "disabled persons," "disabled individuals," and "disabled people" interchangeably. Terms that omit the humanity of disabled persons such as "the disabled" are disfavored, as are many terms used in former statutes and caselaw, such as "handicapped" or "crippled." *See, e.g.*, *Disability Language Style Guide*, NATIONAL CENTER ON DISABILITY AND JOURNALISM, ARIZONA STATE UNIVERSITY (2018), https://ncdj.org/style-guide/ (describing these conventions).

enacted the Americans with Disabilities Act (ADA) to help correct this historical injustice.[2] Congress reaffirmed its opposition to disability discrimination again in 2008 by enacting the Americans with Disabilities Act Amendments Act (ADAAA),[3] which abrogated several limiting Supreme Court decisions. Despite the plain language of the ADA's text, the act's legislative history, and its underlying policies, some courts have undermined the statute by allowing employer defenses[4] based on untoward customer preferences.[5] The customer preference defense asserts that, because businesses could lose customers by employing disabled persons, employers may have legitimate reasons for discriminating against disabled employees and job applicants. While customer preference-based defenses that pertain to safety, privacy, and authenticity have been recognized in other contexts, courts applying the ADA have also allowed defenses based merely on customer aversion to disabled persons. This Note calls upon Congress and the courts to disallow this practice; in addition, it proposes heightened standards to be met in the case of permissible customer preference-based defenses.

Part I.A describes the history of disability discrimination in the United States and the historical context of the ADA and ADAAA. Part I.B addresses the psychology, economics, and reality of untoward customer preferences. Part I.C then describes the judiciary's history of intolerance for customer preference-based defenses under other anti-

2. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2018)). The ADA has four titles. The first covers employment. 42 U.S.C. §§ 12111–12117 (2018). The second covers public services. *Id.* §§ 12131–12165. The third covers public accommodations and private services. *Id.* §§ 12181–12189. The fourth covers miscellaneous provisions. *Id.* §§ 12201–12213. Congressional findings, the act's purpose statement, and definitions are found at 42 U.S.C. §§ 12101–12103.

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

4. These defenses usually take the form of bona fide occupational qualifications (BFOQs), as first contemplated by the Civil Rights Act of 1964, which allow employers to escape liability for discrimination. *See* 42 U.S.C. § 2000e-2(e) (2018). This Note focuses on this type of defense, and thus disparate treatment cases rather than disparate impact cases. *See, e.g.*, Patrolmen's Benevolent Ass'n v. City of New York, 74 F. Supp. 2d 321, 337 (S.D.N.Y. 1999) ("[t]he primary affirmative defense provided by Title VII in a disparate treatment case is the BFOQ").

5. This Note focuses on customer preferences, but the untoward preferences of disabled employees' coworkers, supervisors, vendors, etc. may also motivate employers to take discriminatory employment actions. Employers' incentives to cater to the preferences of these third parties are unlikely to be as strong as incentives to cater to customer preferences, however. *See generally* Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169 (2017).

discrimination statutes, as well as the exceptions for preferences concerning safety, privacy, and authenticity. Part I.C identifies numerous instances in which courts have allowed employers to discriminate against disabled employees because their disabilities have allegedly rendered them "unfit" to interact with or be seen by customers.[6]

Part II.A shows that this "unfit to be seen" exception is contrary to the text of the ADA and argues that sublimating untoward customer preferences is a reasonable accommodation. Part II.B confirms this reading of the ADA by looking to the legislative history of the act. Part II.C identifies the two major policies behind the ADA—limiting the costs of compliance and ensuring fair treatment for disabled employees—and argues that disallowing the "unfit to be seen" exception fulfills both. Part II.D proposes additional guidelines courts may use to ensure compliance with the ADA's text and purpose. This Note concludes by calling upon Congress and the courts to implement such standards and to repudiate the "unfit to be seen" strain of the customer preference defense.

II. Customer Preferences and Disability Discrimination

Disability discrimination has historically been, and still is, a vexing social problem. Though Congress enacted the ADA to curb this type of discrimination, the psychology of untoward customer preferences and the economic incentives businesses have to heed their customers mean that employers frequently attempt to subvert antidiscrimination laws. Though courts have traditionally been intolerant of customer preference-based defenses within the context of Title VII and the Age Discrimination in Employment Act (ADEA), they have displayed more deference to the animus of employers' customers within the context of the ADA.

A. Historical Background

In the United States, discrimination against disabled persons has a long history, both in employment and in other contexts.[7] In 1990,

6. The documentation of this trend is likely the most significant contribution of this Note.

7. *See infra* Part I.A.1.

Congress enacted the ADA in an attempt to combat this history of discrimination, but the act was quickly defanged in the courts.[8] In 2008, Congress enacted the ADAAA, which reaffirmed the legislature's commitment to combatting disability discrimination.[9] Nonetheless, discrimination against disabled persons remains a problem today.

1. History of disability discrimination

The United States has historically treated persons with disabilities shamefully. Americans' attitudes towards disabled persons have traditionally been characterized by fear, paternalism, ignorance, and low expectations. Lamentably, these attitudes remain largely intact today.

Though society's attitudes toward disability have changed over time, the one constant has been negativity.[10] Throughout most of the United States' history, disabled persons were kept out of sight and out of mind.[11] During the mid- and late-1800s, many states and localities codified this norm, passing "ugly laws" that made it illegal for "[a]ny person, who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object . . . [to] expose himself or herself to public view."[12] These laws reflected public perception, as disabled persons were often described with such dehumanizing terms as "vermin," "roadblock[s]," "affront to the public eye," "horrible," "hideous," "monstrosities," "half-human," and "repulsive."[13]

Attitudes toward persons with disabilities did not shift much during the early-1900s, and some states even passed laws which prescribed forced sterilization for the "treatment" of disabled persons.[14] While

8. *See infra* Part I.A.2.

9. *See id.* See *infra* Part I.A.3 for a discussion of the substantive provisions of the ADA.

10. *See, e.g.*, Adrienne Phelps Coco, *Diseased, Maimed, Mutilated: Categorizations of Disability and an Ugly Law in Late Nineteenth-Century Chicago*, 44 GEO. MASON J. SOC. HIST. 23, 23–24 (2010) (documenting negative attitudes towards disabled persons); *see also* David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 183 (1991) (citing changes in attitudes regarding foot binding to argue that disability is a construct).

11. *See* 42 U.S.C. § 12101(a)(2) (2018) ("historically, society has tended to isolate and segregate individuals with disabilities"); Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada/ (last visited Sept. 14, 2019, 5:51 PM); UNIVERSITY OF MINNESOTA, *Disability History Timeline*, http://www.d.umn.edu/cla/faculty/tbacig/studproj/is3099/pplfrst/Untitled1.html (last visited Sept. 14, 2019, 5:46 PM).

12. *See, e.g.*, Coco, *supra* note 10, at 23 (quoting Chicago's ugly law).

13. *Id.* at 31–32 (quoting various newspapers).

14. *See, e.g.*, Eric Mennel, *Payments Start for N.C. Eugenics Victims, But Many Won't Qualify*, NPR (Oct. 31, 2014, 5:04 PM), https://www.npr.org/sections/health-

this practice was challenged in court, the Supreme Court endorsed it. The words of Justice Holmes encapsulated beliefs held by many Americans that disabled persons were incompetent, unfit, likely to starve without assistance, predisposed to commit murder, and that it would be "better for all the world" to prevent them from "continuing their kind."[15] Justice Holmes's opinion is as remarkable for its brevity[16] as it is for its callous attitude and prejudice.[17]

Today, society still characterizes persons with disabilities negatively, frequently due to misconceptions, ignorance, and the continuing effects of past prejudice.[18] Virtually every aspect of disabled persons' tastes, interests, and personalities are attributed to disability, and impairment eclipses sex, race, age, occupation, and family in shaping how others think of persons with disabilities.[19] Disabled individuals are seen as helpless, fueling beliefs that they are unable to perform even minimal essential job functions.[20] Society tends to focus on disabled persons' deficits and on what they cannot do instead of what they can do.[21] And disabled individuals are still frequently shunned, ostracized, and institutionalized.[22]

2. Historical context of the ADA and the ADAAA

The legislative response to the United States' history of disability discrimination was slow to develop. During the early 1900s, advocacy groups for persons with disabilities first began to form, though little substantive progress was made.[23] During the 1950s and 1960s, reform-

shots/2014/10/31/360355784/payments-start-for-n-c-eugenics-victims-but-many-wont-qualify (describing North Carolina's forced sterilization law and modern developments pertaining to it).

15. Buck v. Bell, 274 U.S. 200, 207 (1927).

16. The opinion spans only nine pages. *See id.* at 200.

17. *See id.* at 207 ("[t]hree generations of imbeciles are enough").

18. *See, e.g.*, Hanoch Livneh, *On the Origins of Negative Attitudes Toward People with Disabilities*, 43 REHABILITATION LITERATURE 338 (1982).

19. David Wasserman et al., *Disability: Definitions, Models, Experience*, STAN. ENCYCLOPEDIA PHIL. 1 (May 23, 2016), https://plato.stanford.edu/entries/disability/.

20. *Id.*

21. Engel, *supra* note 10, at 181–82.

22. *See, e.g.*, Kiela Parks, *Out of Sight, Out of Mind: Colorado Continues to Warehouse Mentally Ill Prisoners in Solitary*, ACLU (Aug. 6, 2013, 11:31 AM), https://www.aclu.org/blog/prisoners-rights/cruel-inhuman-and-degrading-conditions/out-sight-out-mind-colorado-continues.

23. Perri Meldon, *Disability History: The Disability Rights Movement*, U.S. NATIONAL

ers were successful in advancing civil rights for women and racial minorities, which helped pave the way for disability rights advocates.[24] In 1973, Congress passed the Rehabilitation Act, which prohibits discrimination on the basis of disability by recipients of federal funds.[25] This legislation was particularly significant because it marked the first time individuals with disabilities were viewed as a discrete class rather than as dissimilar individuals suffering from various illnesses and impairments.[26] In 1975, Congress also passed the Education for All Handicapped Children Act, which required public schools receiving federal funding to provide equal educational access for children with disabilities.[27]

Two major protests also played important roles in the passage of the ADA. In 1977, disabled individuals across the country participated in a sit-in at the Department of Health, Education, and Welfare (HEW) in order to ensure that the department promulgated adequate regulations for the Rehabilitation Act.[28] Besides ensuring that HEW's regulations gave force to the act, the sit-in helped shape disability discrimination as a civil rights issue rather than one of pity or charity.[29]

In 1988, the legislation that would later become the ADA was introduced, but it was repeatedly delayed, due in part to private sector lobbying.[30] In spite of these delays, the legislation enjoyed bipartisan support and encountered "no serious opposition" in Congress.[31] The legislation was largely modeled after the Rehabilitation Act,[32] and it

PARK SERVICE (Dec. 1, 2017), https://www.nps.gov/articles/disabilityhistoryrightsmovement.htm.

24. *Id.*; Mayerson, *supra* note 11.

25. Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–97 (2018)). The Rehabilitation Act foreshadowed many of the provisions of the ADA. *See infra* Part I.A.3.

26. Mayerson, *supra* note 11.

27. Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–82 (2018)).

28. Mayerson, *supra* note 11.

29. Meldon, *supra* note 23.

30. Americans with Disabilities Act of 1988, S. 2345, 100th Cong. (1988); *see also* Americans with Disabilities Act of 1989, S. 933, 101st Cong. (1989). See *infra* Part II.B for further discussion of the ADA's legislative history.

31. Ruth Colker, *The ADA's Journey Through Congress*, 39 WAKE FOREST L. REV. 1, 2 (2004); *see also* 134 CONG. REC. 9386, 22, 212–13 (1988) (disability legislation had bipartisan support and both candidates in the 1988 presidential election were likely to sign it).

32. *See, e.g.*, H.R. REP. NO. 101-485, pt. 3, at 31 (1990); S. REP. NO. 101-116, at 9, 25 (1989) (using the same three-pronged definition of disability as in the Rehabilitation Act).

expressly approved of the Supreme Court's liberal construction of the act in *School Board of Nassau County v. Arline*.[33]

On March 12, 1990, disabled individuals purposefully discarded wheelchairs, walkers, and other mobility aids in order to ascend the steps of the Capitol Building in Washington, D.C.[34] This "Capitol Crawl" called attention to the daily struggles of physically disabled persons—highlighting the need for accessibility in public spaces—and was also used to protest the legislative delays.[35] A few months later, on July 26, 1990, President George H. W. Bush signed the Americans with Disabilities Act into law.[36]

During the 1990s and early 2000s, the Supreme Court issued a number of decisions which limited and weakened the ADA.[37] In 2008, though, Congress responded to these decisions by enacting the Americans with Disabilities Act Amendments Act.[38] The act rejected a number of the Supreme Court's decisions and ordered future courts to interpret the ADA broadly.[39]

3. Substantive provisions of the ADA

The ADA prohibits employers with fifteen or more employees from discriminating in the terms, conditions, or privileges of employment because of an individual's disability, record of such, or association with disabled persons.[40] Disability is defined as a physical or mental impairment that substantially limits one or more major life activity.[41]

33. *See* Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273 (1987); *see also* H.R. REP. NO. 101-485, pt. 3, at 30, 53; S. REP. NO. 101-116, at 23.

34. Meldon, *supra* note 23.

35. *Id.*

36. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2018)). The ADA passed 377 to 28 in the House, with 27 abstentions; it passed 91 to 6 in the Senate, with 3 abstentions. Colker, *supra* note 31, at 26.

37. *See, e.g.*, Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184 (2002); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). These decisions are further discussed in Part II.B.3.

38. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213 (2018)).

39. *E.g.*, 42 U.S.C. § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.").

40. *Id.* § 12102(1). The term "disability" also applies to those who are "regarded as" having a substantially limiting physical or mental impairment. *Id.*

41. *Id.* § 12102(1)(A). The ADA does not apply to LGBTQ-related conditions, sex behavior disorders, kleptomania, pyromania, compulsive gambling, or ongoing substance abuse. *Id.*

Major life activities, in turn, include caring for oneself, eating, sleeping, breathing, seeing, and hearing; walking, standing, lifting, and bending; speaking and communicating; performing manual tasks and working; reading, thinking, concentrating, and learning; and certain bodily functions.[42]

The ADA also requires employers to reasonably accommodate disabled employees and job applicants.[43] Such accommodations may include adapting employer facilities, providing parking or transit for disabled employees and job applicants, and modifying duties, schedules, trainings, exams, and internal policies.[44] Reasonable accommodations may also require providing readers or interpreters, reassigning an employee to a vacant position, or granting up to one year of unpaid leave.[45] Though employers choose what accommodations to provide, courts nevertheless evaluate whether the employer has engaged with the employee in an "interactive process."[46]

Employers that violate the ADA may be liable for backpay for up to two years, front pay, attorneys' fees, and compensatory and punitive damages.[47] Courts may also choose to grant injunctive relief.[48] Courts apply the same evidentiary standards under the ADA as they do for Title VII claims.[49] A plaintiff must first make a prima facie case that he

§ 12211. Impairment is assessed without considering the effects of any corrective measures, except in the case of eyeglasses. *Id.* § 12102(4)(E).

42. *Id.* § 12102(2). Impairments that substantially limit bodily functions may include conditions like diabetes or cancer. 45 C.F.R. § 1153.103(1) (2018). *But see* Susan M. Gibson, *The Americans with Disabilities Act Protects Individuals with a History of Cancer from Employment Discrimination: Myth or Reality?*, 16 HOFSTRA LAB. & EMP. L.J. 167 (1998) (pre-ADAAA inquiry).

43. 42 U.S.C. § 12112(b)(5).

44. *Id.* § 12111(9).

45. *Id.*; Employer-Provided Leave and the Americans with Disabilities Act, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 9, 2016), https://www.eeoc.gov/eeoc/publications/ada-leave.cfm. Employers are generally not required to create a new position for an employee or to approve indefinite leave or permanent telework. *See, e.g.*, Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999) (indefinite leave); White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995) (creating a new position); Work at Home/Telework as a Reasonable Accommodation, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N (Dec. 20, 2017), https://www.eeoc.gov/facts/telework.html (permanent telework).

46. *See, e.g.*, Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1117 (9th Cir. 2000) (liability is appropriate where an employer fails to engage in the interactive process and a reasonable accommodation would have otherwise been possible), *aff'd* 535 U.S. 391, 407 (2002).

47. Remedies for Employment Discrimination, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/remedies.cfm (last visited Jan. 11, 2019, 8:04 AM).

48. *Id.*

49. *E.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

or she is disabled, is qualified for the position in question with or without reasonable accommodation, has suffered a materially adverse employment action, and that this action occurred under circumstances giving rise to an inference of discrimination.[50] The employer may then refute the plaintiff's case by articulating a legitimate, nondiscriminatory reason for the employment decision, and the plaintiff may then show that the proffered reason is mere pretext and must persuade the factfinder of the unlawful discrimination's reality.[51]

The ADA provides essentially two defenses to allegations of disability discrimination. First, employers may escape liability when a disabled employee or job applicant poses a direct threat to health or safety.[52] Second, employers may escape liability when they can prove their qualification standards, tests, or selection criteria are job-related and consistent with business necessity.[53] Most customer preference defenses fall into the latter category.[54]

B. The Customer Preferences Problem

Employers frequently discriminate against employees on the basis of race, color, religion, sex, national origin, age, disability, and other untoward factors in order to cater to customer preferences.[55] This is because customers are psychologically primed—and employers are economically motivated—to act on such preferences.[56] Nonetheless, employers are forbidden from discriminating on these bases in making

50. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

51. *Id.*; Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (ADEA plaintiffs must prove that age was the sole causal factor). In mixed-motive cases, Title VII plaintiffs must prove that race, color, religion, sex, or national origin was *a* factor that led to an adverse employment action. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). At present, courts are divided on which standard applies to ADA plaintiffs. *See also* Derek Runyan, *Confounding the Courts: The Circuit Courts' Failure to Articulate an Appropriate Summary Judgement Standard in Mixed-Motive Individual Disparate Treatment Claims*, 78 U. PITT. L. REV. 375, 386–96 (2017) (documenting the current circuit split).

52. 42 U.S.C. § 12113(b) (2018). This threat may be posed by the disabled person to themselves or others. *See, e.g.*, Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 76 (2002) (upholding employer decision to withdraw job offer because of poor condition of applicant's liver, which could have been worsened by the position); Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1284 (11th Cir. 2001) (upholding adverse employment action against HIV-infected dental hygienist because of danger of patient infection).

53. 42 U.S.C. § 12113(a).

54. *See infra* Part I.C.

55. *See id.*

56. *See infra* Part I.B.1 and I.B.2.

employment decisions.[57] Because Title VII, the ADEA, and the ADA often conflict with customers' base inclinations and employers' economic incentives, employers frequently attempt to circumvent antidiscrimination law in order to cater to customer preferences. This is clearly seen with regard to disability discrimination.[58]

1. The psychology of customer preferences

The tendency for human beings to discriminate based on a desire to associate with people who are not disabled seems to be psychologically ingrained.[59] Researchers have shown that human beings are most comfortable with others who look like themselves, who have had similar experiences, and who share similar attitudes and personalities.[60] Likewise, human beings are predisposed to favor facial symmetry, averageness, and familiarity.[61] Many of these preferences are likely based on what psychologists call the "mere-exposure effect." This effect describes the phenomenon in which people tend to develop preferences for things that they are familiar with, simply because they are exposed to them more often.[62]

57. *E.g.*, Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. § 631 (2018)) (proscribing discrimination on the basis of age); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e–2000e-17 (2018)) (race, color, religion, sex, or national origin); Pregnancy Discrimination Act of 1978, Pub. L. No. 95–555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)) (pregnancy); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2018)) (disability).

58. *See infra* Part I.B.3.

59. This sentiment is encapsulated by the well-known adage, "birds of a feather flock together." *See, e.g.*, Kevin Woodson, *Derivative Racial Discrimination*, 12 STAN. J. C.R. & C.L. 335, 342 (2016) (discussing the phrase and its history).

60. *See, e.g.*, Donn Byrne & William Griffitt, *Interpersonal Attraction*, 24 ANN. REV. PSYCHOL., 316 (1973) (individuals are attracted to those with similar attitudes); Wu Youyou et al., *Birds of a Feather Do Flock Together: Behavior-Based Personality-Assessment Method Reveals Personality Similarity Among Couples and Friends*, 28 PSYCHOL. SCI. 276, 276–77 (2017) (individuals are attracted to those with similar personalities); Berit Brogaard, *Are We Attracted to People Who Look Like Us?*, PSYCHOLOGY TODAY (May 13, 2015), https://www.psychologytoday.com/ us/blog/the-mysteries-love/201505/are-we-attracted-people-who-look-us (individuals are attracted to those with similar physical features).

61. *See, e.g.*, Anthony C. Little et al., *Facial Attractiveness: Evolutionary Based Research*, 366 PHIL. TRANSACTIONS ROYAL SOC'Y 1638 (2011).

62. *See, e.g.*, Angela Y. Lee, *The Mere Exposure Effect: Is It a Mere Case of Misattribution?*, 21 ADVANCES IN CONSUMER RESEARCH 270, 270-75 (Chris T. Allen & Deborah Roedder John eds., 1994) (describing the mere exposure effect with regard to product placement); Patricia Pliner, *The Effects of Mere Exposure on Liking for Edible Substances*, 3 APPETITE: J. FOR INTAKE RES. 283 (1982) (food); Leslie A. Zebrowitz, et al., *Mere Exposure and Racial Prejudice: Exposure to Other-Race Faces Increases Liking for Strangers of that Race*, 26 SOC.

These psychological underpinnings tend to result in customer discrimination against disabled employees because most people do not have either actual or apparent disabilities, and so the characteristics, experiences, and personalities of disabled persons tend to be unfamiliar to customers generally.[63] Likewise, some disabilities, such as the loss of a limb, disfiguring diseases, and certain types of autism, can result in bodily asymmetry.[64] Disabilities in general are often evidenced by atypical physical and mental characteristics, and these characteristics are often met with fear and prejudice by the general population.[65]

2. The economics of customer preferences

Customers are free, of course, to choose not to patronize businesses because of their employees.[66] Employers are not free, however, to discriminate against employees in order to cater to untoward customer preferences.[67] Because employers have strong economic incentives to do so, they often discriminate against disfavored individuals in order to cater to untoward customer preferences.[68]

COGNITIVE & AFFECTIVE NEUROSCIENCE 259 (2008) (race).

63. *See* Matthew W. Brault, *Americans with Disabilities: 2010*, U.S. CENSUS BUREAU 4 (2012), https://www.census.gov/library/publications/2012/demo/p70-131.html (less than twenty percent of the population of the United States suffers from a disability). While many people may have disabled family members, friends, neighbors, etc., an even lesser percentage of Americans suffer from *visible* disabilities, and the symptoms of individual disabilities are wide-ranging.

64. *E.g.*, *ADNP Syndrome*, U.S. NATIONAL LIBRARY OF MEDICINE, https://ghr.nlm.nih.gov/condition/adnp-syndrome (last visited Jan. 9, 2019, 9:48 AM) (distinctive facial features of ADNP, a type of autism).

65. *See, e.g.*, Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 284 (1987) ("[S]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."); Jessica Scheer, *They Act Like It's Contagious: A Study of Mobility Impairment in a New York City Neighborhood*, *in* SOCIAL ASPECTS OF CHRONIC ILLNESS, IMPAIRMENT AND DISABILITY 62 (Stephen C. Hey et al. eds., 1984) (documenting fears that disabled persons threaten the health and safety of others); *see also* 42 U.S.C. § 12113(e) (2018) (public concern surrounding HIV and AIDS); Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J.L. MED. & ETHICS 327, 328–35 (2004) (same).

66. *But see* Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223 (2016) (proposing that Congress extend civil rights laws to cover customer discrimination directly).

67. *See, e.g.*, 29 U.S.C. § 623(a) (2018) (prohibiting employment discrimination on the basis of age); 42 U.S.C. § 2000e-2(a) (race, color, religion, sex, and national origin); *id.* § 12112 (disability); *see also* Tamosaitis v. URS, Inc. 781 F.3d 468, 482 (9th Cir. 2015) ("[W]e have long held that a customer's discriminatory preference does not justify an employer's discriminatory practice.").

68. *See infra* Part I.C.

In order to stay in business and turn a profit, businesses must attract and retain customers; in order to attract and retain customers, businesses must satisfy customer demands. These demands are usually reasonable, such as expecting reliable, courteous, and responsive service or preferring attractive corporate images, quality products, and low prices.[69] But customer demands may also develop out of irrational fears and prejudices. Businesses often summarize the need to cater to customer preferences with sweeping phrases like "the customer is always right," "customer satisfaction is our highest priority," and "the customer is king."[70] Such phrases have frequently been criticized by courts and commentators because they do not account for irrational fears and prejudices, but they are still pervasive in the business world.[71] Businesses are conditioned to cater to customer preferences in almost every regard, and it is naturally difficult for employers to divorce themselves from normal economic incentives in order to comply with legal mandates. As a result, customer psychology and economic reality prompt businesses to discriminate on the basis of disability and other unlawful factors.

3. The reality of customer preferences

Businesses discriminate on the basis of untoward customer preferences with disconcerting regularity. Fifty years of caselaw attests that attempts to raise customer preferences in defense to charges of discrimination will not be going away, and that businesses are consistently

69. *See generally* ART WEINSTEIN, SUPERIOR CUSTOMER VALUE: STRATEGIES FOR WINNING AND RETAINING CUSTOMERS (3d ed. 2012).

70. Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2174 n.15 (2018); Lea B. Vaughn, *The Customer is Always Right. . . Not: Employer Liability for Third Party Sexual Harassment*, 9 MICH. J. GENDER & L. 1, 13–14 (2002). Phrases like these are long-lived and still pervasive. *See, e.g.*, Littleton v. Pilot Travel Ctrs., LLC, 568 F.3d 641, 645 (8th Cir. 2009) (reasoning that the business principle of "the customer is always right" provided a legitimate reason to discipline an employee following a customer complaint); Charles T. LeViness, *Caveat Emptor Versus Caveat Venditor*, 7 MD. L. REV. 177, 178 (1943) (detailing the origins and history of the phrase "the customer is always right").

71. Some phrases may even be seen as inviting discrimination and harassment. *See* Vaughn, *supra* note 70, at n.45 (Kmart slogan "I'm here for you" viewed as inviting harassment); *see also* Callwood v. Dave & Buster's, Inc., 98 F. Supp. 2d 694, 706 (D. Md. 2000) ("The days of 'the customer is always right' [as a cognizable defense or justification] are long past."); Alicia A. Grandey et al., *The Customer is Not Always Right: Customer Aggression and Emotion Regulation of Service Employees*, 25 J. ORGANIZATIONAL BEHAV. 397 (2004) (describing the idiom's contemporary prevalence).

ignorant or dismissive of antidiscrimination law on this point.[72] In addition, customer preference defenses are beginning to evolve to cover discrimination by customers directly,[73] as well as discrimination that is based on customer feedback[74] and discrimination that is perpetuated by customers when they take the place of traditional supervisors or employers.[75]

Customer preference discrimination on the basis of disability is no less prevalent than in the context of race, sex, age, or other characteristics. Employers often justify discrimination against disabled employees by asserting that their quality of work is lower than what the customer demands.[76] Businesses also justify discrimination against disabled persons by alleging customer aversion to the appearance, mannerisms, or personalities of disabled employees.[77] Some employers have even gone so far as to systematically record customer preferences

72. *See, e.g.*, EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 586–87 (6th Cir. 2018) (funeral home attempting to argue that transgender employee would present a distraction that would obstruct the funeral home's ability to serve grieving families); Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 913–14 (7th Cir. 2010) (nursing home attempting to argue that its policy of acceding to patients' preferences for nurses of a certain race was reasonable); U.S. EQUAL EMP. OPPORTUNITY COMM'N, SIGNIFICANT EEOC RACE/COLOR CASES, https://www1.eeoc.gov//eeoc/initiatives/e-race/caselist.cfm?renderforprint=1#customer (last visited Jan. 9, 2019, 12:51 PM) (hospital attempting to argue that acceding to father's demand that no African-American nurses treat his newborn was reasonable; employer attempting to argue that its refusal to promote an employee was reasonable based on its belief that customers in "redneck country" would not accept an African-American account manager). Court cases are, of course, only a small percentage of actual customer preference-based discrimination.

73. Juan M. Madera et al., *Wait! What About Customer-Based Subtle Discrimination?*, 10 INDUS. & ORGANIZATIONAL PSYCHOL. 107, 107-10 (2017) (arguing that service industry employees are particularly vulnerable to direct discrimination from customers in the form of rudeness, lower tips, etc.); *see also* Lu-in Wang, *When the Customer Is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL'Y & L. 249, 250 (2016).

74. Flake, *supra* note 70, at 2172–73 (discussing implicit bias and customer feedback mechanisms); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1416–17 (2009) (customer feedback mechanisms allow employers to "launder out" discriminatory intent).

75. Alex Kirven, Comment, *Whose Gig Is It Anyway: Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 285 (2018) (describing conventions at Uber and Lyft where customers rate drivers without higher-level review).

76. *See, e.g.*, Combes v. AIG Consultants, Inc., No. 95 C 1865, 1996 WL 596397 (N.D. Ill. Oct. 10, 1996) (finding that client's preference for service by a non-disabled employee was based on quality of work product).

77. *See, e.g.*, Chico Dairy Co. v. W. Va. Human Rights Comm'n, 382 S.E.2d 75 (W.Va. 1989) (alleging that woman missing an eye was not fit to be seen by vendors) (pre-ADA state law claim); Adam R. Pulver, *An Imperfect Fit: Obesity, Public Health, and Disability Antidiscrimination Law*, 41 Colum. J.L. & Soc. Probs. 365, 396–98 (2008) (discussing scholarship surrounding cases that have held that discrimination on the basis of customer aversion to obesity is permissible).

for nondisabled employees in order to more effectively screen disabled employees from contact with prejudiced customers.[78] Because of the psychology and economics of customer preference, disability discrimination by businesses is, and will likely continue to be, an unfortunate reality.

C. Customer Preferences as a Defense to Discrimination

In general, customer preferences are not a defense to discrimination on the basis of race, color, religion, sex, national origin, age, or disability.[79] There are essentially three exceptions, however. Courts have recognized customer preferences as a defense for issues that pertain to safety, privacy, and authenticity, respectively.[80] These are the only exceptions under Title VII and the ADEA, and courts tend to be skeptical of customer preference defenses in such cases. In practice, however, many courts also recognize a fourth exception for ADA claims; namely, that some employees and job applicants are "unfit to be seen" by customers.[81] This covert exception is essentially a reformulation of the ugly laws of the late-1800s and should be expressly repudiated.

1. Customer preferences under Title VII and the ADEA

Before turning to the judiciary's treatment of customer preference in disability discrimination cases, it is helpful to consider how this defense is treated in other contexts. Customer preferences are not generally a defense to claims under Title VII or the ADEA.[82] Courts have applied this rule consistently to claims alleging discrimination on the basis of race, color, religion, sex, national origin, and age.

78. *See, e.g.*, EEOC v. Cornwell Pers. Assocs., Ltd., No. 95-C-854, 1995 WL 788208 (E.D. Wis. Aug. 18, 1995) (business recording client preferences for employees of a particular disability status).

79. *See infra* Part I.C.1.

80. *See infra* Part I.C.2.

81. Hodgdon v. Mount Mansfield Co., 624 A.2d 1122, 1132 (Vt. 1992); *see infra* Part I.C.3.

82. *See, e.g.*, Lam v. Univ. of Haw., 40 F.3d 1551, 1560 n.13 (9th Cir. 1994) ("The existence of . . . third party preferences for discrimination does not . . . justify discriminatory hiring practices."); Sparenberg v. Eagle All., No. JFM-14-1667, 2015 WL 6122809, at *6 (D. Md. Oct. 15, 2015) ("An employer may not immunize its actions by ducking behind the preferences of a client."); Ames v. Cartier, Inc., 193 F. Supp. 2d 762, 769 (S.D.N.Y. 2002) ("While pandering to customers' discriminatory preferences could very well help effectuate a sale, employers nevertheless 'may not discriminate on the basis of their customers' preferences.'") (citations omitted)

Race and color are not included in the section of Title VII that describes bona fide occupational qualifications (BFOQs).[83] This omission was likely deliberate,[84] and courts have consistently held that customer preferences cannot justify discrimination on the basis of race or color.[85] To date, courts have only recognized two scenarios in which race may be a BFOQ—law enforcement operations and acting.[86]

Non-religious employers are prohibited from discriminating on the basis of religion in employment, and discriminatory customer preferences are not usually a defense.[87] When an employee's need for accommodation of a religious practice, observance, or good faith belief conflicts with customer preferences, however, courts have held that this imposes more than a de minimis burden on an employer and thus are willing to find undue hardship.[88] Religious employers can discriminate on the basis of religion in employment, including in positions that are non-religious.[89] Religious employers may also discriminate on *any* basis in the hiring and employment of ministers and other clergy.[90]

(quoting Wigginess, Inc., v. Fruchtman, 482 F. Supp. 681, 692 (S.D.N.Y. 1979)).

83. *See* 42 U.S.C. § 2000e-2(e) (2018) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . *religion, sex, or national origin* in those certain instances where *religion, sex, or national origin* is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . . .") (emphasis added).

84. *See, e.g.*, Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980), *reversed and remanded*, 456 U.S. 273 (1982).

85. *See* Knight v. Nassau Cty. Civil Serv. Comm'n, 649 F.2d 157, 162 (2d Cir. 1981), *cert. denied*, 454 U.S. 818 (1981).

86. *See* Miller v. Tex. State Bd. of Barber Exam'rs, 615 F.2d 650, 654 (5th Cir. 1980) (acting); Baker v. City of St. Petersburg, 400 F.2d 294, 301 n.10 (5th Cir. 1968) (undercover infiltration of an all-black criminal organization); *see also* 110 Cong. Rec. 7213,7217 (1964) (comments of Senator Clifford Case on acting).

87. *See, e.g.*, Balk v. New York Inst. of Tech., 683 F. App'x 89, 94 (2d Cir. 2017).

88. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004).

89. *E.g.*, 42 U.S.C. § 12113(d) (2018) (The ADA does not prohibit religious organizations "from giving preference in employment to individuals of a particular religion to perform work connected with the [organization]" or from requiring "that all applicants and employees conform to the religious tenets of [the] organization."); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (discussing the religious organization exception's application to non-religious activities); Curay-Cramer v. Ursuline Acad., 450 F.3d 130 (3d Cir. 2006) (discussing the exception generally); *see also* 29 C.F.R. § 1630.16(a) (2018) (religious organizations nonetheless "may not discriminate against a qualified individual, who satisfies the permitted religious criteria, because of his or her disability.").

90. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (discussing this ministerial exception and interpreting "minister" broadly); *see also* Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999) (incorporating the ministerial exception into ADA caselaw), *cert. denied*, 531 U.S. 814 (2000).

The general rule against customer preference-based defenses developed primarily within the context of sex discrimination in the airline industry.[91] This prohibition has since been extended to cover sex discrimination in most other industries.[92] Courts have, however, recognized a narrow exception for cases involving sexual titillation.[93] Customer preference defenses that are proffered in response to allegations of national origin and age discrimination have likewise been found to be unpersuasive.[94]

2. Safety, privacy, and authenticity exceptions

Courts have essentially recognized three exceptions to the general rule against customer preference-based defenses. These exceptions are for customer preferences that bear upon safety, privacy, or authenticity.[95]

Concerns regarding the first exception, safety, must generally be well-founded and substantial. For example, courts have upheld a customer preference-based defense where the threat of death was prescribed by law.[96] Courts have not upheld the defense in cases where the

91. Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000) (striking down weight requirements which were proportionally skewed and imposed a greater burden on female flight attendants), *cert. denied* 532 U.S. 914 (2001); Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir. 1971) ("[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid."); Wilson v. Sw. Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (rejecting defendant's arguments that sex appeal was part of the essence of its business).

92. *See, e.g.*, Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981) (employers cannot refuse to hire women based on customer preferences for men) (chemical manufacturer).

93. *See infra* Part I.C.2.

94. *E.g.*, Lam v. Univ. of Haw., 40 F.3d 1551, 1560 n.13 (1994) ("The existence of such third party preferences for [national origin] discrimination does not, of course, justify discriminatory hiring practices."); Silver v. N. Shore Univ. Hosp., 490 F. Supp. 2d 354, 365 (S.D.N.Y. 2007) (finding defendants' attempts to shift blame to others in an age discrimination suit to be unpersuasive); Ames v. Cartier, Inc., 193 F. Supp. 2d 762, 768–69 (S.D.N.Y. 2002) (finding that a supervisor's remark that customers related better to people who looked like them was evidence of national origin discrimination).

95. *See, e.g.*, Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F.L. REV. 473, 484 (2001) (discussing these exceptions). Some courts recognize an exception for customer preferences that pertain to the "essence" of employers' businesses, but this is generally equivalent to the authenticity exception. *See, e.g.*, *Wilson*, 517 F. Supp. at 299.

96. Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983) (company refused to hire non-Muslim helicopter pilots for flights to Mecca because Saudi Arabian law made entry by non-Muslims punishable by beheading), *aff'd*, 746 F.2d 810 (5th Cir. 1984).

threat was nebulous or hypothetical.[97] In addition, courts have recognized preferences that pertain to the safety of customers, as well as preferences that pertain to the safety of others.[98] Safety-related age BFOQs have been upheld in various contexts, including for pilots, police officers, firefighters, bus drivers, and where certain physical requirements are necessary for efficient job performance.[99]

Concerns regarding the second exception, privacy, generally bear upon customer or third-party aversion to being seen without clothes by a member of the opposite sex.[100] These concerns tend to arise in settings like hospitals, nursing homes, bathrooms, and prisons.[101] In some instances, courts defer to such customer preferences in part because of the Constitution's protections for privacy.[102]

Concerns regarding the last exception, authenticity, are often ambiguous and have only been recognized in a limited number of circumstances. Customer preference-based discrimination is allowed in the

97. *See, e.g.*, Abrams v. Baylor Coll. of Med., 581 F. Supp. 1570 (S.D. Tex. 1984), *aff'd in part*, 805 F.2d 528 (5th Cir. 1986) (feeble concern for the safety of Jewish staff members not a defense for excluding them from a program in Saudi Arabia).

98. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (upholding a ban on females serving in "contact positions" at an all-male penitentiary because of concerns for order and because of the potential for assault); EEOC v. Univ. of Tex. Health Sci. Ctr., 710 F.2d 1091, 1097 (5th Cir. 1983) (upholding university's practice of only hiring campus police officers under the age of forty-five because such officers were purportedly better able to deal with students).

99. *See, e.g.*, Correa-Ruiz v. Calderon-Serra, 411 F. Supp. 2d 41 (D.P.R. 2005) (police officers). *See generally* Frank J. Cavico & Bahaudin G. Mujtaba, *The Bona Fide Occupational Qualification (BFOQ) Defense in Employment Discrimination: A Narrow and Limited Justification Exception*, 7 J. BUS. STUD. Q. 15 (2016).

100. *See* Healy v. Southwood Psychiatric Hosp., 78 F.3d 128, 133 (3d Cir. 1996) (requiring at least one staff member of each gender to be available to patients at all times); Jones v. Hinds Gen. Hosp., 666 F. Supp. 933 (S.D. Miss. 1987) (upholding practice of only allowing male nurses to administer catheters for male patients); EEOC v. Mercy Health Ctr., No. Civ. 80–1374–W, 1982 WL 3108, at *5 (W.D. Okl. Feb. 02, 1982) ("intimate duties"). *See generally* Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147 (2004).

101. Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998) (upholding prison policy designating certain positions as female-only to preserve prisoner privacy); Norwood v. Dale Maint. Sys., Inc., 590 F. Supp. 1410 (N.D. Ill. 1984) (washroom attendants); Fesel v. Masonic Home of Del., 447 F. Supp. 1346, 1354 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979) (upholding nursing home's refusal to hire male attendants given customer preference for females). *But see* Hardin v. Stynchcomb, 691 F. 2d 1364, 1374 (11th Cir. 1982) (declining to uphold prison policy of refusing to hire females in order to preserve prisoner privacy).

102. *See* Jones v. Henryville Corr. Facility, 220 F. Supp. 3d 923, 929 (S.D. Ind. 2016).

case of actors and actresses,[103] restaurants projecting an authentic atmosphere,[104] and other comparable situations.[105] Courts have attempted to limit the authenticity exception to practices that pertain to a business's "essence,"[106] though commentators have criticized this distinction since businesses often engage in many different enterprises and have multiple purposes.[107]

3. Customer preferences under the ADA

At first glance, customer preferences are not a defense to disability discrimination either.[108] In reality, though, courts are often more willing to recognize customer preferences for ADA claims than for claims under Title VII or the ADEA.[109] This is particularly troubling in the context of the "unfit to be seen" exception. While many courts at least pay lip service to the general rule against customer preference-based defenses, some essentially agree to reappropriate the ugly laws of the late-1800s for the use of modern employers.[110]

For example, in one case, the Fourth Circuit upheld the discharge of a disabled salesperson in part because his epileptic seizures allegedly upset customers.[111] There, an epileptic man worked for a shoe retailer

103. 29 C.F.R. § 1604.2(a) (2018) ("[T]he following situations do not warrant the application of the bona fide occupational qualification exception: . . . refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except . . . [w]here it is necessary for the purpose of authenticity or genuineness, . . . e.g., an actor or actress.").

104. Util. Workers Union v. S. Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970) (upholding Chinese restaurant's policy requiring workers to be of Chinese nationality).

105. *See, e.g.*, Cavico & Mujtaba, *supra* note 99, at 22–23 (discussing the Walt Disney Company's successful practice of hiring workers to match theme park cultural areas so as to provide visitors with authentic experiences).

106. *See*, Wilson v. Sw. Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981).

107. *See, e.g.*, Yuracko, *supra* note 100, at 167.

108. *E.g.*, EEOC v. C.R. England, Inc., 644 F.3d 1028, 1039 (10th Cir. 2011).

109. Michael D. Moberly, *Perception or Reality: Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 HOFSTRA LAB. & EMP. L.J. 345 n.52 (1996) ("[T]he [customer preference strain of the BFOQ] defense retains some vitality, both in the disability discrimination context and elsewhere."). *But see*, Mark. R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution: A Totality of the Circumstances Framework*, 37 CAP. U.L. REV. 965, 1006 (2009) ("Congress and the courts seem to exhibit a bit more concern about the potential prejudices faced by disabled in appearance policies than by those encountered by the original protected classes in Title VII.").

110. *See C.R. England, Inc.*, 644 F.3d at 1039 ("At the outset, we acknowledge that an employer's accommodation of the discriminatory preferences of other employees, clients, or customers could, under certain circumstances, expose the employer to liability for discrimination.") (finding for the employer).

111. Martinson v. Kinney Shoe Corp., 104 F.3d 683 (4th Cir. 1997).

for several years before being hired on full-time.[112] The retailer was aware of the man's epilepsy, and the man requested accommodation in the form of tolerance for his periodic fainting spells.[113] The retailer admitted that the man was reliable, fully capable of performing his job, and a good salesperson—and that his seizures did not cause the store to lose customers.[114] Nonetheless, the Fourth Circuit upheld the discharge, which was motivated by concerns that the man's seizures could have *theoretically* caused the retailer to lose customers.[115]

In another instance, a federal district court declined to inquire into the true motives behind a client's preference for service from a non-disabled employee.[116] Instead, the court decided that the preference must have been based solely on the quality of the employee's work product.[117] In another, the federal district court disregarded evidence of coworker comments complaining about the workload they were forced to shoulder in order to facilitate accommodations for a disabled worker.[118]

In yet another case, a federal district court upheld the suspension and constructive discharge of a disabled doorman.[119] The adverse employment actions occurred directly after customer complaints about the doorman's body odor and bad breath, both of which were possible symptoms of his disability.[120] The court, however, chose to view these symptoms as independent of the disability.[121] This lack of analysis is typical. Instead of addressing the customer preference issue directly, federal courts often choose to skirt it by disregarding potentially incriminating evidence.

112. *Id.* at 685.

113. *Id.*

114. *Id.*

115. *See* EEOC v. Kinney Shoe Corp., 917 F. Supp. 419, 427 n.5 (W.D. Va. 1996) (citing deposition testimony which expressed concern that the seizures impacted customers), *aff'd* 104 F.3d 683 (4th Cir. 1997).

116. Combes v. AIG Consultants, Inc., No. 95 C 1865, 1996 WL 596397 (N.D. Ill. Oct. 10, 1996).

117. *See id.*

118. *See* Kazmierski v. Bonafide Safe & Lock, Inc., 223 F. Supp. 3d 838, 847 (E.D. Wis. 2016); *see also* EEOC v. C.R. England, Inc., 644 F.3d 1028, 1039 (10th Cir. 2011) (disregarding evidence that an employer discouraged coworkers from working with plaintiff-employee by making them sign a form acknowledging the employee's HIV-positive status).

119. Seeman v. Gracie Gardens Owners Corp., 794 F. Supp. 2d 476, 479–80 (S.D.N.Y. 2011).

120. *Id.* at 478–79.

121. *Id.* at 480–83.

Courts addressing state law claims have been more explicit in their acceptance of discriminatory customer preferences. In one instance, the West Virginia Supreme Court denied the disability discrimination claim of a grocery store assistant manager who was missing an eye.[122] The individual was denied a promotion because of her "deformed" physical appearance.[123] The West Virginia Supreme Court gave credence to the employer's concerns that the employee's artificial eye would not be something a vendor or customer "would like to encounter."[124]

In another particularly callous instance, the Vermont Supreme Court denied a worker's disability claim in order to defer to customer preferences.[125] There, a disabled woman who was missing her upper teeth worked as a chambermaid at a ski resort.[126] The woman was terminated because the ski resort believed she was "unfit to be seen by customers."[127] The state supreme court endorsed the employer's view that "a particular physical condition [may be] a bona fide occupational qualification for [a] particular job," even where the condition is related to disability.[128]

These federal and state cases illustrate two principles which characterize many courts' attitudes toward disability discrimination. The first is general disregard. Courts are often too willing to look the other way when discrimination motivated by customer preferences rears its head. Many cases that clearly implicate untoward customer preferences lack analysis on the subject, and courts too often discount evidence that would otherwise support allegations of disability discrimination.

The second principle illustrated by these cases is that courts are often unduly sympathetic to the position of employers. Many courts disregard discrimination's effects on disabled employees in order to focus on business "necessities." These courts focus on finding that an employer had legitimate, nondiscriminatory reasons for the adverse employment action, on the disabled employee's inability to perform the essential job functions of the position, and on how the symptoms

122. Chico Dairy Co. v. W. Va. Human Rights Comm'n, 382 S.E.2d 75, 77 (W.Va. 1989). It should also be noted that this case was decided shortly before the ADA was enacted. *See id.*

123. *Id.* at 77–78.

124. *Id.* at 78.

125. Hodgdon v. Mount Mansfield Co., 624 A.2d 1122 (Vt. 1992).

126. *Id.* at 1124.

127. *Id.* at 1132.

128. *Id.*

of the disability render the individual "unfit," rather than on the underlying discrimination.[129] Thus, a certain subset of courts essentially recognize an unsavory exception to the general rule against customer preference-based defenses when disabled employees are deemed "unfit to be seen."[130]

II. Analysis of the ADA and Customer Preferences

The "unfit to be seen" exception, which tacitly recognizes customer aversion to disabled workers as a legitimate, nondiscriminatory reason for adverse employment decisions, is not contemplated by the ADA. The exception is contrary to the ordinary meaning of the statute, and sublimating customer preferences probably qualifies as a reasonable accommodation. The exception is also contradicted by the broad remedial purpose of the ADA, as seen in the act's legislative history and express allocation of costs. The exception gives undue weight to the costs businesses bear in sublimating untoward customer preferences, and it is unfair to disabled workers. For these reasons, the "unfit to be seen" exception to the general rule against customer preference-based defenses should be expressly rejected by Congress; in the alternative, courts should cease to recognize it.

A. The Text of the ADA

The text of the ADA does not directly address customer preferences. Nonetheless, it broadly proscribes disability discrimination, and it does not mention customer preferences alongside the act's other recognized defenses.[131] The ADA also requires employers to reasonably accommodate disabled employees and job applicants, and this requirement likely encompasses the possibility of foregoing individual customers because of a refusal to condone animus.[132] Thus, the text of the

129. In finding the symptoms of disability to be disqualifying, courts tend to overlook the realities of employment discrimination. Few employers discriminate against disabled persons because they are *classed* as disabled. Instead, employers discriminate because they find the symptoms of disability to be disadvantageous. Discrimination on the basis of the symptoms of disability *is* disability discrimination.

130. *Hodgdon*, 624 A.2d at 1132.

131. *See infra* Part II.A.1.

132. *See infra* Part II.A.2.

ADA likely prohibits most customer preference-based defenses to discrimination, and it certainly prohibits the "unfit to be seen" variety of the defense.

1. "No covered entity shall discriminate."

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability [with regard to the] terms, conditions, and privileges of employment."[133] This broad prohibition against disability discrimination must be the backdrop for any analysis of whether the ADA contemplates customer preference-based defenses.[134] In general, all affirmative defenses are an exception to the usual rule against disability discrimination, and the defendant bears the burden of proof.[135] Unlike Title VII, the ADA provides some clarification as to the meaning of "discriminate," namely that it includes limiting an employee or job applicant in any way that adversely affects his or her employment opportunities or status.[136] This likely applies to situations where an employer "limits" a disabled employee by prohibiting him or her from having contact with a customer or other third party,[137] which could affect employment opportunities like commissions, bonuses, promotions, training, experience, etc. The ADA also states that discrimination includes utilizing standards, criteria, or methods of administration that effectuate disability discrimination or that *perpetuate the discrimination of others* who are subject to the employer's administrative control.[138] While customers may not be

133. 42 U.S.C. § 12112(a) (2018).

134. The first step in statutory interpretation is to find the ordinary meaning of a statute's language. *E.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98–99 (1991); Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 552 (1990); Caminetti v. United States, 242 U.S. 470, 485 (1917).

135. Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187, 221-22 (1991) ("The burden of proving that a discriminatory qualification is a BFOQ . . . rests with the employer.") (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 248 (1989) and Dothard v. Rawlinson, 433 U.S. 321, 333 (1977)).

136. 42 U.S.C. § 12112(b)(1).

137. *See, e.g.*, Chico Dairy Co. v. W. Va. Human Rights Comm'n, 382 S.E.2d 75, 77–78 (W.Va. 1989) (employer viewing contact with vendors as undesirable).

138. 42 U.S.C. § 12112(b) ("[T]he term 'discriminate . . . ' [includes] utilizing standards, criteria or methods of administration . . . that perpetuate the discrimination of others who are subject to common administrative control.").

subject to the employer's "administrative" control, employers do exercise some control over their clientele and this principle may reasonably be extended to the customer preference defense.[139]

The ADA's purpose section sheds further light on when customer preference defenses are allowable.[140] First, the act finds that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society."[141] The right to full participation in society likely includes the right to be free from discrimination based on an employer's desire to cater to customer preferences. In addition, Congress stated that the goal of the ADA is "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for disabled individuals.[142] This goal is largely thwarted when courts allow customer preference-based defenses, particularly those of the "unfit to be seen" variety.

The ADA does not expressly provide for a customer preference BFOQ defense.[143] Instead, the ADA allows the defendant to raise an affirmative defense either when a disabled employee or job applicant poses a direct threat to the health or safety of themselves or others, or when the employer uses criteria that are "job-related and consistent with business necessity" and performance cannot be accomplished with reasonable accommodation.[144] Customer preferences that pertain to significant health or safety risks are clearly codified as a defense under the ADA.[145] The second situation is essentially a reformulation of Title VII's BFOQ and business necessity defenses.[146] It is this defense

139. *See* Folkerson v. Circus Enters., Inc., 107 F.3d 754 (9th Cir. 1997) (employer liable for harassment by patron if it knew or should have known of the harassment and took insufficient remedial action). This provision of the statute clearly applies to coworker preferences. *Cf.* 42 U.S.C. § 12112(b)(3).

140. *See* 42 U.S.C. § 12101; *see also* Sutton v. United Airlines, Inc., 527 U.S. 471, 484–86 (1999) (citing ADA's legislative findings); United States v. Turkette, 452 U.S. 576, 588–90 (1981) (consulting statute's findings and purpose section); Knebel v. Hein, 429 U.S. 288, 292 n.9 (1977) (consulting statute's declaration of policy section).

141. 42 U.S.C. § 12101(a)(1).

142. *Id.* § 12101(a)(7).

143. *See id.* § 12113.

144. *Id.* § 12113(a).

145. *See generally* Lawrence O. Gostin, *The Americans With Disabilities Act and the Corpus of Anti-Discrimination Law: A Force for Change in the Future of Public Health Regulation*, 3 HEALTH MATRIX 89, 113–20 (1993) (discussing what risks are "significant").

146. *See* 42 U.S.C. § 12113(a); *cf. id.* § 2000e-2(e), (k); *see also* Morton v. United Parcel Serv., Inc., 272 F.3d 1249, 1261–63 (9th Cir. 2001) (discussing the defenses available under the ADA). *But see* Bates v. United Parcel Serv., Inc., 511 F.3d 974, 995–96 (9th Cir. 2007) (overruling *Morton*, but doing so in part because the ADA's business necessity defense also necessitates reasonable accommodation and noting that the defense still applies to disparate treatment

that arguably covers the rest of the customer preference-based defenses.[147] The ADA's business necessity defense is couched in qualifying language, however,[148] and the Supreme Court has stated that this type of affirmative defense "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities."[149] It is debatable whether customer preferences are reasonably job-related since they are often based on psychologically engrained, but unfounded fears and prejudices rather than concerns that are rational or proven.[150] And though customer preferences might at least theoretically constitute business necessity, most of the time the ADA's reasonable accommodation provisions require their sublimation.[151] The text of the ADA thus mitigates against allowing the "unfit to be seen" variety of the customer preference defense.

2. Reasonable accommodation

The ADA requires employers to reasonably accommodate disabled employees and job applicants unless the accommodation would result in undue hardship.[152] Sublimating customer preferences, particularly preferences for avoiding interactions with disabled employees, is likely a reasonable accommodation. Most reasonable accommodations require employers to incur some sort of expense, whether it be paying other employees to modify trainings or exams, providing readers or interpreters, adapting facilities to increase accessibility, or something else.[153] Requiring employers to forgo the business of certain customers imposes similar costs.[154] On the other hand, however, these costs are

claims).

147. If this were not so, the principle of *expressio unius est exclusio alterius* would dictate that customer preference defenses do not apply to disability discrimination in any form. *See generally* Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115, 130–37 (2010).

148. 42 U.S.C. § 12113(a) (showing that criteria are job-related and consistent with business necessity "*may* be a defense to a charge of discrimination") (emphasis added).

149. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

150. *See supra* Part I.A.1.

151. *See supra* Part II.A.2.

152. 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.15(d) (2018). This is true regardless of whether the employer raises an affirmative defense. *See* 42 U.S.C. § 12113(a).

153. *See, e.g.*, J.H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903 (2003) (discussing the costs of accommodation and the ADA generally).

154. Most costs associated with reasonable accommodations are minor. Andrew Houtenville & Valentini Kalargyrou, *People with Disabilities: Employers' Perspectives on Recruitment Practices, Strategies, and Challenges in Leisure and Hospitality*, 53 CORNELL HOSPITALITY Q. 40, 42 (2011) (noting that over seventy percent of accommodations in the hospitality industry

of a different nature from the usual costs of accommodation since they may be indeterminate and are not undertaken affirmatively.[155] But because all major businesses must comply with the ADA, these costs are borne by all employers alike, lessening any individualized burden. Customers that opt to "take their business elsewhere" may very well be forced to return to original, nondiscriminatory businesses after finding that their untoward tastes are not tolerated anywhere. In any case, these costs are precisely the kind which the ADA allocates to employers.

Accommodations requiring employers to sublimate customer preferences would not usually impose undue hardship on employers, either. For an employer to show hardship under the ADA, it must incur "significant difficulty or expense."[156] In evaluating whether an accommodation imposes undue hardship on an employer, the ADA allows for consideration of the nature and cost of the accommodation; the resources and number of employees of the facility in question; the resources and number of employees of the business as a whole; and the organizational, geographic, and fiscal relationships of the facility to the business.[157] Thus, the only time that sublimating customer preferences would be likely to impose undue hardship on an employer is when the costs are substantial when compared to the employer's size.[158] Scenarios where small, modern-day employers are driven to the verge of bankruptcy after employing disabled persons *solely* because of unto-

cost less than five hundred dollars and twenty percent cost nothing).

155. In this regard, these costs may be comparable to requested accommodations for indefinite leave. *See, e.g.*, Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999); U.S. EQUAL EMP. OPPORTUNITY COMM'N, THE AMERICANS WITH DISABILITIES ACT: APPLYING PERFORMANCE AND CONDUCT STANDARDS TO EMPLOYEES WITH DISABILITIES (Dec. 20, 2017), https://www.eeoc.gov/facts/performance-conduct.html#fn77 ("[G]ranting indefinite leave . . . can impose an undue hardship on an employer's operations.").

156. 42 U.S.C. § 12111(10)(A).

157. *See id.* § 12111(10)(B); *see also* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1124 (2010) ("The duty to accommodate is a substantial obligation, . . . one that is not subject to a cost-benefit balance but instead to a cost-resource balance . . . ; it is also . . . liable to increase over time."); Julie Brandfield, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 127 (1990) ("[P]rofitability and morale are at the essence of the four statutory factors.").

158. Lisa A. Lavelle, *The Duty to Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only to Disable Small Businesses?*, 66 NOTRE DAME L. REV. 1135 (1991) (discussing the ADA's impact on small businesses); Weber, *supra* note 157, at 1150–51 (reasonable accommodation may require significant effort and costs, can be expensive, and need not accrue to the benefit of an employer).

ward customer preferences are more at home in academic hypotheticals than in the real world, however.[159] As such, it is probably reasonable to expect employers to sublimate customer preferences in order to accommodate disabled employees. On the whole, the text of the ADA mitigates against allowing employers to discriminate against disabled persons in order to pander to discriminatory customer preferences.

B. The Legislative History of the ADA

Where the text of a statute is not dispositive, courts often consult legislative history to aid in statutory construction.[160] The text of the ADA indicates that the act proscribes disability discrimination based on untoward customer preferences, and this reading is confirmed by the statute's legislative history. This history shows that the ADA was meant to have a broad remedial purpose,[161] that Congress was aware of the costs the act would impose on employers, and that it did not intend courts to give undue weight to customer preference-based defenses.[162] Again, this is particularly true with respect to the "unfit to be seen" variety of the customer preference defense.

1. The broad remedial purpose of the ADA

In 1990, Congress enacted the ADA in order to combat discrimination against persons with disabilities;[163] therefore, the broad remedial purpose of the ADA likely includes disallowing most customer preference-based defenses. The statute expressly describes its purpose as,

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in

159. *See* Lavelle, *supra* note 158, at 1186 n.283 (discussing the original draft of the ADA's "bankruptcy" exception).

160. *See, e.g.*, Carr v. United States, 560 U.S. 438 (2010). The text here is likely dispositive, but since the legislative history confirms this reading it may still be informative.

161. *See* discussion *infra* Parts II.B.1, II.B.3.

162. *See infra* Part II.B.2.

163. *See supra* Part I.A; *see also* S. REP. No. 101-116, at 9 (1989) (statement of President George H. W. Bush) ("[S]tatistics consistently demonstrate that disabled people are the poorest . . . and largest minority in America.").

enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities.[164] This statement indicates that the act's broad remedial purpose includes curtailing individual preferences for discrimination on the basis of disability.[165]

The ADA's broad antidiscrimination mandate was well understood by both proponents and opponents of the act, and the legislative record is rife with statements which show the legislature's broad intentions.[166] The legislative history of the act also indicates that part of its purpose was to help integrate disabled persons "into the economic and social mainstream of American life,"[167] and that this included limiting discrimination on the basis of customer preferences.[168]

Congress first took up the subject of disability discrimination in response to the HIV and AIDS crises which were then particularly prominent issues of public concern.[169] As part of the debate surrounding these topics, Representative Jim Chapman proposed an amendment to the ADA in order to permit employers to bar employees with communicable diseases from food handling positions.[170] Congress, however, rejected the idea that customer preferences or phobias may be a defense to discrimination.[171]

164. 42 U.S.C. § 12101(b) (2018).

165. Since Congress cannot regulate customer preferences directly, it does so indirectly through businesses. *See* Bartlett & Gulati, *supra* note 66, at 227 ("[T]he regulation of firms alone is sufficient to achieve society's nondiscrimination goals.").

166. *See, e.g.*, 135 CONG. REC. 19,810 (1989) (statement of Sen. David Durenberger) ("[T]he basic principle of this legislation [is] to provide a clear and comprehensive prohibition against discrimination against persons with disabilities."); *id.* at 19, 803 (remarks of Sen. Orrin Hatch) (the ADA's objective was to establish a clear, comprehensive prohibition against disability discrimination); S. REP. NO. 101-116, at 20 (1989) (discussing the act's broad remedial purpose); Colker, *supra* note 31, at 26 ("[B]oth the proponents and opponents of the ADA understood the definition of disability to have a very broad scope.").

167. H.R. REP. NO. 101-485, pt. 3, at 23 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 446.

168. *Id.* at 30.

169. Colker, *supra* note 31, at 2, 6 (describing Congress's "overwhelming commitment to cover individuals with HIV infection"); *see also* 135 CONG. REC. 22,734 (1989) (statement of Rep. Dan Burton displaying homophobia in opposition to the legislation).

170. Colker, *supra* note 31, at 21.

171. *See* Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 493–94 (1991) (discussing Chapman's proposed amendment in relation to Congress's rejection of customer preference defenses).

2. The costs of the ADA and undue hardship

The costs incurred by employers in failing to cater to discriminatory customer preferences likely do not rise to the level of undue hardship, for several reasons.[172] First, the legislative history of the ADA shows that Congress was well aware of the costs the act would impose on employers.[173] For instance, despite extensive consideration of an amendment first proposed by Senator Orrin Hatch, Congress chose not to allow small businesses a tax credit in accordance with their efforts to accommodate disabled employees.[174] Second, the legislative history indicates that costs must be significant in order to constitute undue hardship under the ADA.[175] For instance, the House rejected an amendment that would have imposed a presumption of undue hardship when the costs of accommodation exceeded ten percent of the disabled employee's annual salary or wages—a threshold that would be difficult to meet in many scenarios.[176] Third, the legislative history indicates that Congress was reticent to allow employers to discriminate against disabled workers even when the employer would suffer undue hardship.[177]

Congress also used language similar to that found in Title VII and was presumptively cognizant of Title VII's lack of a general customer preference defense.[178] In addition, arguments that customers might refuse to patronize restaurants that employed persons with disabilities

172. *See supra* Part II.A.2.

173. *See, e.g.*, 135 CONG. REC. 19,881–82 (1989) (statement of Sen. Gordon Humphrey opposing the act's "monumental" costs).

174. *See* Colker, *supra* note 31, at 20–22.

175. 135 CONG. REC. 19,872.

176. *See* 136 CONG. REC. 10,903–09 (1990).

177. *See* S. 2345, at § 3(5) (1988) (enacted) (defining reasonable accommodation without providing an undue hardship exception). *But see* Colker, *supra* note 31, at 10–11 (describing the reservations of multiple senators with regard to the exclusion of an undue hardship exception). Of course, the failure of Congress to enact this bill and the eventual inclusion of an undue hardship exception may easily mitigate the other way. Here, any reliance on legislative history would encounter the oft-cited criticism that doing so is akin to looking over a crowd and picking out one's friends. *E.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

178. 136 CONG. REC. 10,856 (statement of Rep. Steny Hoyer) ("Whenever possible, we have used terms of art from the 1964 Civil Rights Act and from the Rehabilitation Act of 1973 phrases already interpreted in courts throughout this land so that business can know exactly what we mean."); *see also* H.R. REP. NO. 110-730, pt. 1, at 16 (2008). When Congress uses words or concepts with meanings established elsewhere, courts presume their meanings are the same. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–24 (1992); Sullivan v. Stroop, 496 U.S. 478, 484 (1990); United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988). This presumption is stronger when statutes contain similar subject matter. *See, e.g.*, Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986).

were met with fierce opposition and repeatedly characterized as promoting fear and prejudice.[179] Congress was aware of the costs businesses would incur in order to comply with the ADA, and it did not believe that these costs generally rose to the level of undue hardship.

3. The broad remedial purpose of the ADAAA

The ADAAA's reaffirmation of the broad prohibition against disability discrimination further mitigates against most forms of the customer preference defense. After the ADA was passed in 1990, the Supreme Court issued a number of decisions which severely limited its scope. For instance, the Court required substantial limitation to be proven after corrective measures were taken,[180] and it held that "mere difference" between an individual's ability to perform a major life activity and an average person's ability to do so was not a substantial limitation.[181] The Court questioned whether working was a major life activity,[182] and it strengthened language surrounding substantial impairments and major life activities.[183] As a result, the ADA of the 1990s and early-2000s was a largely ineffective statute.[184]

In 2008, Congress reemphasized the broad scope of the ADA by passing the Americans with Disabilities Act Amendments Act.[185] Congress passed this act largely in response to the Supreme Court's narrowing decisions, stating amongst other things that the standards imposed by the Court "created an inappropriately high level of limitation necessary to obtain coverage under the ADA."[186] Congress specifically

179. 136 CONG. REC. 10,913 (statements of Rep. Henry Waxman and Rep. Steve Bartlett).

180. Sutton v. United Air Lines, Inc., 527 U.S. 471, 488 (1999).

181. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999).

182. Murphy v. United Parcel Serv., 527 U.S. 516, 523 (1999).

183. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002). These decisions relied on the EEOC's regulations. *See, e.g.*, Kate S. Arduini, Note, *Why the Americans with Disabilities Act Amendments Act is Destined to Fail: Lack of Protection for the "Truly" Disabled, Impracticability of Employer Compliance, and the Negative Impact It Will Have on Our Already Struggling Economy*, 2 DREXEL L. REV. 161, 169–71 (2009).

184. *See, e.g.*, Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 REG. 21, 21 (2000) ("[S]tudies of the consequences of the employment provisions of the ADA show that the Act has led to less employment of disabled workers.").

185. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C. (2018)).

186. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(a)(8), (b)(5), 122 Stat. 3553, 3554; *see also* ADA Amendments Act of 2008, Pub. L. No. 110–325, § (2)(b)(3), 122 Stat. 3553, 3554 (overturning the Supreme Court's narrow interpretation of the "regarded as" prong).

rewrote the statute to require that the definition of disability be construed broadly.[187] As a result, any attempt to raise customer preferences as a defense to discrimination must be read in this light. Customer preferences will seldom justify businesses flouting the broad remedial purpose of the ADA since Congress has clearly indicated that the costs of accommodating disabled workers are to be borne by employers.

C. The Policies of the ADA

In enacting the ADA, Congress essentially balanced two policies—the costs employers incur in avoiding disability discrimination and the unfairness of discrimination faced by disabled persons—and chose to prioritize the latter.[188] The costs of sublimating customer preferences are usually minor and are often offset by positive externalities resulting from diversity and inclusion.[189] In part because disabilities are substantially similar to immutable characteristics covered by Title VII and the ADEA, it is unfair to allow employment discrimination against disabled persons simply because of the irrational tastes of an employer's customers.[190] Congress's legislative choices are entitled to deference, and the judiciary's tolerance for the "unfit to be seen" customer preference exception usurps the legislature's role as policy maker.[191]

1. Costs of sublimating customer preferences

Disallowing customer preference-based discrimination imposes some costs on businesses in the form of compliance and lost customers.[192] The ADA also imposes the costs of governmental enforcement

187. 42 U.S.C. § 12102(4)(A) (2018).

188. *See* discussion *infra* Part II.C.1.

189. *See* discussion *infra* Part II.C.2; *see also* Craig Westergard, Note, *You Catch More Flies with Honey: Reevaluating the Erroneous Premises of the Military Exception to Title VII*, 20 MARQ. BEN. & SOC. WELFARE L. REV. 215, 248-49 (2019) (citing sources).

190. *See* discussion *infra* Part II.C.3.

191. *E.g.*, Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 138 (1985) (stating that courts should defer to Congress when the legislature makes policy choices that involve weighing competing goals).

192. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 480–94 (1992) (the ADA costs businesses sales and customers when it disallows discrimination based on customer preferences); Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act Part I: Workplace Accommodations*, 46 DEPAUL L. REV. 877, 898–909 (1997) (discussing the costs imposed by the ADA).

on all taxpaying entities.[193] In the aggregate, however, these costs are insubstantial. Most rational consumers do not walk away from the lowest price or the highest quality product just because of an irrational aversion to the employment of disabled persons.[194] Instead, their rational desire to maximize utility prevails over any irrational prejudice against disabled persons.[195] In addition, the costs of the ADA's bar against customer preference-based discrimination will decrease over time as previously prejudiced customers are exposed to persons with disabilities and their irrational beliefs begin to fade.[196]

The costs of accommodation are also slight. Disabled persons can, with reasonable accommodation, perform essential job functions just as effectively as other individuals.[197] The only real exception to this truism is when customer preferences for nondisabled employees are based on concerns for health or safety, which the text of the ADA already addresses.[198] The inherent costs of accommodation tend to be either low or nonexistent.[199] In any case, it is the prerogative of the

193. *See, e.g.*, S. REP. NO. 10-116, at 90–94 (1989) (discussing costs the ADA would impose on federal, state, and local governments).

194. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 496 (1992) (consumers are usually rational); Monroe Peter Friedman, *Quality and Price Considerations in Rational Consumer Decision Making*, 1 J. CONSUMER AFF. 13, 13 (1967) (rational consumers tend to account for price and quality).

195. *See, e.g.*, Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 520–21 (1980); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979). While it may be rational for businesses to give heed to customer preferences, this only reinforces irrational prejudices. Cass Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 760 (1991) (economically rational discrimination tends to reinforce prejudice).

196. Jessica Walker & Katrina Scior, *Tackling Stigma Associated with Intellectual Disability Among the General Public: A Study of Two Indirect Contact Interventions*, 34 RES. IN DEVELOPMENTAL DISABILITIES 2200, 2201 (2013) (repeated exposure decreases stigma).

197. *See* Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 86 (2000). As such, customer preferences for nondisabled persons are almost always irrational. *See, e.g.*, Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 848 (2001) (consumer discrimination on the basis of race or sex is irrational); Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 169–70 (1992) (discussing erroneous beliefs and irrationality).

198. 42 U.S.C. § 12113(b) (2018). Such concerns must still be legitimate, of course. A customer's irrational belief that cancer is contagious, or that diabetes precludes occupation as a teacher or a doctor would not implicate this defense. *Compare* Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984), *with* Abrams v. Baylor Coll. of Med., 581 F. Supp. 1570 (S.D. Tex. 1984), *aff'd in part and rev'd in part*, 805 F.2d 528 (5th Cir. 1986).

199. Blanck, *supra* note 192, at 903 ("[D]irect costs of the accommodations for any particular disability tend to be low, [and] many companies regularly make informal and undocumented accommodations that require minor and cost-free workplace adjustments that are implemented directly by an employee and [a] supervisor."); *see also* Kuehl v. Wal-Mart Stores, Inc., 909 F.

legislature to impose these costs on businesses,[200] and to impose utility costs on customers.[201] Congress has found that disability discrimination itself "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[202] The costs of such dependency and nonproductivity likely outweigh any costs associated with disability antidiscrimination laws.

2. Benefits of sublimating customer preferences

The benefits that accrue as discrimination decreases and inclusivity increases are well documented. One of the primary benefits of decreased discrimination against disabled persons is that worker productivity increases.[203] Worker morale and motivation improve when inclusivity increases,[204] and diversity also helps increase creativity and innovation in the workplace and results in a more positive public image.[205]

Accommodating disabled workers can also lead to increased business.[206] For example, Representative Amo Houghton of New York told of a restaurant in his district that, to comply with state law, "was forced to install an elevator to take disabled patrons to one of the three floors

Supp. 794, 798 (D. Colo. 1995) (store greeter periodically sitting on stool while at work).

200. U.S. CONST. art. I, § 8 (commerce clause). The commerce power is extremely broad and allows Congress to regulate virtually all aspects of American business and society. *See, e.g.*, Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1685–99 (2002). *But see, e.g.*, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

201. *See* Kelman, *supra* note 197, at 848 ("The customer will bear only psychic losses . . . .").

202. 42 U.S.C. § 12101(a)(8) (2018).

203. Pamela S. Karlan & George Rutherglen*, Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 23 (1996) (accommodating disabled workers increases worker productivity); *see also* Blanck, *supra* note 192, at 904 (accommodating disabled workers allows qualified workers to stay in the work force and reduces absenteeism).

204. *See, e.g.*, Jennifer A. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715, 723 (2011); Swinton W. Hudson, Jr., *Diversity in the Workforce*, 3 J. EDUC. & HUM. DEV. 73, 80 (2014); M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, WILLIAMS INST. (2013), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-of-LGBT-Policies-May-2013.pdf (last visited Oct. 21, 2019).

205. *See, e.g.*, Hudson, *supra* note 204; Brooke & Tyler, *supra* note 204; Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 473 (1998).

206. *See, e.g.*, Blanck, *supra* note 192, at 879 n.130 (noting that hiring, working with, and accommodating disabled persons increases available customer pools, employee morale, profitability, creativity, and flexibility).

of the restaurant. The proprietor resisted the mandate but finally complied. To his surprise, he found that his business increased because of his initiative. The move helped attract [disabled persons] to his restaurant."[207] Because some accommodations increase accessibility for both workers and patrons alike, complying with antidiscrimination law may help businesses to increase their customer bases directly. But accommodating disabled persons also attracts customers indirectly by enhancing employers' images and creating other synergistic benefits.[208] When antidiscrimination laws are successful, these benefits succeed in offsetting many of the costs of compliance.[209]

3. Fairness of sublimating customer preferences

It is fair to both employers and disabled persons to disallow most types of customer preference defenses to discrimination. Employers have been on notice of the ADA's requirements since at least 1990.[210] The ADA was easily foreseeable after the enactment of the Rehabilitation Act in 1973,[211] was phased in gradually,[212] and was not fully enforced by the courts until after the ADAAA was passed in 2008.[213] While disabilities are not always immutable, the acquisition of a disability usually lacks scienter or fault, and so it is unfair to disabled persons to allow employers to discriminate on the basis of a characteristic that cannot be changed.[214] Disability discrimination contradicts fundamental moral precepts like doing good to all and the Golden Rule.[215] Fundamentally, discrimination in employment on the basis of disability is irrational.[216] It is based on unfounded fears and prejudices that

207. 136 CONG. REC. 10,875 (1990).

208. *See, e.g.*, Karlan & Rutherglen, *supra* note 203, at 23.

209. John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1601–02 (1992).

210. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2018)).

211. *See* Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–797 (2018)).

212. *See* 42 U.S.C. § 12111(5)(A).

213. *See* Americans with Disabilities Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213 (2018)); *see also supra* Part I.A.2 and Part II.B.1.

214. *See* Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1238–39 (2003).

215. *See* Neil Duxbury, *Golden Rule Reasoning, Moral Judgment, and Law*, 84 NOTRE DAME L. REV. 1529 (2009); Hunter v. Ward, 476 F. Supp. 913, 918 & n.3 (E.D. Ark. 1979).

216. *See supra* Part II.C.I.

cannot be justified by the discriminatory preferences of an employer's customers.[217] Because the costs of accommodating disabled workers tend to be low and are often offset by the benefits of increased diversity and inclusion, and because disability discrimination is fundamentally unfair, courts should only recognize defenses based on customer preferences in limited circumstances.

D. How Courts Should Treat Customer Preferences under the ADA

Customer preference-based defenses under the ADA and other antidiscrimination statutes should receive similar treatment.[218] This Note proposes the following with regard to customer preference defenses under the ADA: first, that preferences pertaining to safety generally be considered a defense; second, that preferences pertaining to privacy not be considered a defense; third, that preferences pertaining to authenticity be considered a defense only within the context of acting and only when the disability is reasonably apparent and negatively affects audiences; and fourth, that the "unfit to be seen" strain of the customer preference defense be expressly repudiated.[219]

Customer preferences that pertain to health or safety are expressly recognized by the ADA, and so are permissible.[220] Customer preferences that pertain to privacy usually only arise in the context of sex discrimination, and there is no compelling reason to extend this rationale to disability discrimination.[221] Customer preferences that pertain to authenticity generally only arise in the context of acting or in cultivating a desired atmosphere, as in the case of an authentic Chinese

217. Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 284 (1987) ("[S]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."); Feder v. Bristol-Myers Squibb Co., 33 F. Supp. 2d 319, 333 (S.D.N.Y. 1999) ("[Employers] cannot justify otherwise unlawful discrimination on the ground that one's customers do not like to deal with members of a protected class.").

218. Jones, *supra* note 171, at 494 (predicting that customer preference under the ADA would align with the caselaw under Title VII). Similar treatment of ADA and Title VII claims would be efficient because employers would only need to comply with a single legal standard. It would also be fair because Title VII and ADEA plaintiffs would not be able to recover windfalls unavailable to ADA plaintiffs.

219. This proposal is not dramatic. Instead, it essentially recommends that courts comply with the text of the ADA, the intentions of the enacting legislature, the ADA's underlying policies, and the caselaw surrounding antidiscrimination law generally.

220. 42 U.S.C. § 12113(b) (2018).

221. *See supra* Part I.C.2.

restaurant.[222] Historical or artistic accuracy may be a compelling reason to allow customer preference-based defenses within the context of acting; cultivating an atmosphere that is free of disabled persons is antithetical to the ADA's purpose, however, and so cannot be considered a compelling justification.[223] Customer preferences that are based on aversion to a disabled person's appearance, smell, voice, and so on are facially discriminatory, and catering to this kind of animus is likewise contrary to the ADA.[224]

This proposal could be further refined with regard to safety- and authenticity-based defenses. The policies of the ADA are maximized, first, when customer preferences are real rather than hypothetical; second, when disregarding such preferences would impose significant hardship on an employer; and third, when employers must meet a heightened duty of accommodation if they wish to cater to subjective customer preferences.

Hypothetical customer preferences are not a compelling reason to accept employers' affirmative defenses and have been consistently rejected by courts.[225] Hypothetical preferences can easily be fabricated by employers that wish to discriminate and can be based on faulty assumptions about customer preferences.[226] As such, hypothetical preferences can never result in legitimate undue hardship or true business necessity.[227]

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222. *See supra* Part I.C.2; *see also* Util. Workers Union v. S. Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970).

223. *See supra* Part II.B.

224. *See supra* Part II.A, Part II.B, and Part II.C.

225. *See, e.g.*, EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 586 (6th Cir. 2018) ("We hold . . . that a [defendant] cannot rely on customers' *presumed* biases.") (emphasis added); EEOC v. Kinney Shoe Corp., 917 F. Supp. 419, 427 n.5 (W.D. Va. 1996) (relying on deposition testimony which assumed that an employee's disability would negatively affect customers), *aff'd* 104 F.3d 683 (4th Cir. 1997); *see also* Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 303 (N.D. Tex. 1981) (rejecting defendant's claim as "speculative at best").

226. This is part of the problem with cases like *Chico Dairy* and *Kenny Shoe Corporation*, which are described in in detail in Part I.C.3. In *Chico Dairy*, the employer assumed without evidence that vendors would be off put by an employee's prosthetic eye. Chico Dairy Co. v. W. Va. Human Rights Comm'n, 382 S.E.2d 75 (W.Va. 1989). Likewise, in *Kenny Shoe Corporation*, the employer's concerns that an employee's seizures would negatively affect customers were largely hypothetical. Martinson v. Kenney Shoe Corp., 104 F.3d 683 (4th Cir. 1997).

227. *Sw. Airlines Co.*, 517 F. Supp. at 303 ("[N]or is there competent proof that the customer preference for females is so strong that Defendant's male passengers would cease doing business with Southwest . . . ."); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1241 (2003) (discussing the court's insinuation in Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 798–99 (8th Cir. 1993) that defendants must demonstrate the imposition of "a real economic cost"). *But see* Torres v. Wis.

Customer preference-based defenses must also allege significant hardship in order to be legally cognizable. In general, prioritizing nondiscrimination against disabled employees at the expense of customer preferences is a reasonable accommodation.[228] Employers may escape this duty if they can show that accommodation would result in undue hardship, but this burden must be significant to satisfy the requirements of the ADA.[229] While employers are not required to venture to the verge of bankruptcy to accommodate disabled workers, customer preferences must result in more than mere unprofitability.[230] Employers seeking to justify discriminatory employment decisions on the basis of customer preferences must therefore prove that sublimating these preferences would result in significant undue hardship.

Customer preferences that are idiosyncratic or subjective should be scrutinized even more carefully.[231] Employers owe a heightened duty to accommodate disabled employees when customer biases against them are irrational and based on fear or prejudice. By following these recommendations, and limiting defenses based on customer preferences, courts will more fully implement the policies espoused by the ADA and more effectively protect the rights of disabled workers.

III. CONCLUSION

The United States has a storied history of discrimination against persons with disabilities—from the ugly laws of the late-1800s, to judicially-sanctioned forced sterilization during the 1920s, to the "unfit to be seen" exception tacitly accepted by some modern courts. Congress enacted the ADA to combat such undesirable discrimination. The ordinary language of the act, its broad remedial purpose, and its underlying policies each mitigate in favor of disallowing most forms of

Dep't of Health & Soc. Servs., 859 F.2d 1523 (7th Cir. 1988) (en banc) (finding that it was unrealistic and unfair for the district court to require empirical evidence of the benefits of restricting prison guards to only females), *cert. denied*, 489 U.S. 1017 (1989).

228. *See supra* Part II.A.2.

229. 42 U.S.C. § 12111(10)(A) (2018); *see also* Weber, *supra* note 157, at 1150–51.

230. *See, e.g.*, Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 609 (9th Cir. 1982) ("[C]ustomer preference may be taken into account only when it is based on the company's *inability* to perform the primary function or service it offers.") (emphasis added); *Sw. Airlines Co.*, 517 F. Supp. at 303 (citing Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971)) (raising customer preferences as a defense requires "business necessity, not business convenience").

231. Chapman v. AI Transport, 229 F.3d 1012, 1044 (11th Cir. 2000) (Birch, J., concurring in part and dissenting in part) ("[C]ourts have examined and should continue to examine subjective reasons with higher scrutiny than objective reasons.").

the customer preference defense. Congress and the courts can uphold the ADA's policies and protect persons with disabilities from discrimination by expressly repudiating the "unfit to be seen" strain of this defense; they can also further the act's policy goals by adopting heightened standards in evaluating all employer defenses that are based on untoward customer preferences.

*Craig Westergard**

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