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## Outdated, Archaic, and Stereotypical: Current Medicaid Income and Asset Limits Discriminate Against Working Individuals with Disabilities

Megan Parker

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**OUTDATED, ARCHAIC, AND STEREOTYPICAL:  
CURRENT MEDICAID INCOME AND ASSET LIMITS DISCRIMINATE AGAINST  
WORKING INDIVIDUALS WITH DISABILITIES**

Megan Parker<sup>1</sup>

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<sup>1</sup> Megan Parker is a third year J.D. / LL.M. student at the University of Akron School of Law in Akron, OH. I would like to thank Director Charles Oldfield for giving me the legal research and writing tools I needed, Associate Dean Willa Gibson for her guidance in writing this paper, and Professor George Horvath for helping me ask the right questions throughout my research. I would also like to thank my mom, Jaclyn Sims, and my sister, Nancie Parker, for their unwavering support throughout law school and for giving me the drive to write this paper. Finally, I would like to thank all my friends who listened to me rant about a government funded medical insurance program for the past two years.

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## I. INTRODUCTION

Imagine a young female with physical disabilities, dependent on life sustaining equipment, such as a ventilator, working toward her life-long dream of increasing the number of U.S. attorneys with disabilities and improving the shortcomings of the legal profession for persons, like her, who have disabilities.<sup>1</sup> Advancements in society and technology in general have facilitated increased opportunities for persons with disabilities to successfully enter and stay in the workforce with their peers.<sup>2</sup> This student receives a call from the hiring partner of a law firm that she interviewed with and gets the offer to join the firm as their 1L Diversity Fellow for the summer. Excited at the opportunity to gain firsthand legal experience, the law student accepts the offer without hesitation. However, when she receives the written offer for the position, detailing the income for the nine-week fellowship, the law student hesitates to sign the offer out of fear. The income is greater than she is allowed to earn within a year to maintain her Medicaid—the health insurance paying for her life sustaining equipment. After all the progress throughout history toward equality and equity for individuals with disabilities, she never imagined encountering discrimination that could prevent her from being able to work and maintain her Medicaid.

In 1990, due to widespread discrimination on the basis of disabilities, Congress enacted legislation ensuring individuals with disabilities could: (1) enjoy equal opportunities as their non-disabled counterparts and (2) have access to legal recourse when discrimination continued

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<sup>1</sup> See American Bar Association, *ABA Profile of the Legal Profession*, 40 (July 1, 2020) <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> ("The number of lawyers at American law firms who report having disabilities remains small, at roughly one-half of 1% of all lawyers, but the percentage is double today what it was a decade ago . . ."); Brandon Lowrey, *How The Legal Industry Lets Down Lawyers With Disabilities*, LAW360 (Aug. 13, 2018) <https://www.law360.com/articles/1071971/how-the-legal-industry-lets-down-lawyers-with-disabilities> [<https://perma.cc/Y6WQ-HCGL>] ("Attorneys with disabilities could be working at firms in greater numbers than anyone knows, but simply aren't open about it, for fear that they might face stigma or discrimination.").

<sup>2</sup> Admin. for Cmty. Living, *How Technology is Creating New Employment Opportunities for People with Disabilities*, ACL BLOG (Oct. 30, 2019), <https://acl.gov/news-and-events/acl-blog/how-technology-creating-new-employment-opportunities-people-disabilities> [<https://perma.cc/Z34J-KMBK>] (last modified May 7, 2020).

occurring.<sup>3</sup> In enacting the Americans with Disabilities Act of 1990 (“ADA”), one of the most prominent pieces of legislation for individuals with disabilities,<sup>4</sup> Congress explicitly stated the United States’ goals “regarding individuals with disabilities are to assure *equality of opportunity, full participation, independent living, and economic self-sufficiency* for such individuals . . . .”<sup>5</sup> This language closely resembles the language of the Founding Fathers in the Declaration of Independence, which states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights*, that among these are *Life, Liberty, and the pursuit of Happiness*.”<sup>6</sup>

Despite guidance from the Declaration of Independence and the United States Constitution,<sup>7</sup> history is filled with countless instances where discriminated persons fought for their unalienable rights to be fully recognized and enforced by law.<sup>8</sup> In this history, society stereotypically viewed—and continues to view—individuals with disabilities in a discriminatorily negative light, such as being “different from fully human” or “something to be fixed, an

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<sup>3</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), § 2(a)(4)–(5) (codified as 42 U.S.C. § 12101(a)(4)–(5)) (“individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination . . . [and] continually encounter various forms of discrimination, including outright intentional exclusion . . .”).

<sup>4</sup> *Introduction to the ADA*, ADA.GOV, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) [<https://perma.cc/G2GW-YRHZ>] (last visited Dec. 7, 2021) (“Modeled after the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin – and Section 504 of the Rehabilitation Act of 1973 -- the ADA is an ‘equal opportunity’ law for people with disabilities.”).

<sup>5</sup> Americans with Disabilities Act of 1990, § 2(a)(8) (codified as 42 U.S.C. § 12101(a)(7)) (emphasis added).

<sup>6</sup> The Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

<sup>7</sup> See U.S. CONST. amend. I–X; see e.g., *id.* XIV § 1 (“nor shall any state deprive any person of *life, liberty, or property*, without *due process of the law* . . .”) (emphasis added).

<sup>8</sup> See *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483, 485 (1954), *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (“We concluded that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding the Fifth and Sixth Amendments require police to inform individuals in custody they have a right to remain silent and be assisted by an attorney).

abnormality to be corrected or cured.”<sup>9</sup> These negative views are reflected in the language used and restrictions imposed in the United States’ Medicaid and Social Security laws<sup>10</sup> as well as in the way courts address the legal issues these individuals face.<sup>11</sup> Despite society’s progress toward inclusivity and acceptance, certain laws still reflect these outdated views.<sup>12</sup>

Adults with disabilities are twice as likely to have income under the poverty threshold due to a lesser likelihood of being employed and having lower wages on average, than their non-disabled counterparts.<sup>13</sup>

[F]inancial stability is based not only on income, but also on the relationship between income and expenses. Because these income measures do not consider expenses or the additional costs associated with living with a disability, they understate the true level of economic hardship experienced by households that include a person with a disability.<sup>14</sup>

Because of Ohio Medicaid’s low limits on assets and earnings for eligibility,<sup>15</sup> individuals with disabilities often must choose between maintaining their life-sustaining health insurance or having an opportunity of full participation, independent living, and economic self-sufficiency.<sup>16</sup> By imposing income and asset limitations on individuals with permanent disabilities, a physical

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<sup>9</sup> Laurie Block, *Stereotypes About People with Disabilities*, DISABILITY HISTORY MUSEUM, <https://www.disabilitymuseum.org/dhm/edu/essay.html?id=24> [<https://perma.cc/4JFB-8CSG>] (last visited Oct. 13, 2021, 1:45 PM).

<sup>10</sup> Virtual Interview with David Banas, Att’y, Hickman & Lowder Co., LPA (Oct. 1, 2021) [hereinafter Oct. 1 Interview with David Banas] (recording on file with author).

<sup>11</sup> *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 342 (1976) (“Still, the *disabled worker's need* is likely to be *less* than that of a welfare recipient”) (emphasis added).

<sup>12</sup> Oct. 1 Interview with David Banas, *supra* note 10.

<sup>13</sup> Nanette Goodman, Michael Morris, Zachary Morris & Stephen McGarity, *The Extra Costs of Living with a Disability in the U.S. – Resetting the Policy Table*, NATIONAL DISABILITY INSTITUTE, 2 (Oct. 2020) <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/10/extra-costs-living-with-disability-brief.pdf>.

<sup>14</sup> *Id.*; *see also Id.* at 1 (“Many means-tested public benefits in the U.S. impose asset and income limits, but do not take the additional cost of disability into consideration.”).

<sup>15</sup> *See infra* Figure 1.

<sup>16</sup> *Policy & Advocacy: Employment, Training, and Wages*, THEARC.ORG, <https://thearc.org/policy-advocacy/employment-training-and-wages/> [<https://perma.cc/22VJ-RMUR>] (last visited Oct. 13, 2021) (“Unrealistically low limits on assets and earnings make people fear losing vital public benefits if they work too many hours or earn too much.”).

or mental impairment indefinitely impacting an individual's health and ability to perform certain tasks,<sup>17</sup> Medicaid and Social Security programs are in direct conflict with the Congress' explicitly stated goals in enacting the ADA.<sup>18</sup>

## II. BACKGROUND

### A. Key Definitions

The Medicaid, Medicare, and Social Security programs, both on a federal and state level, are extremely complex: such that attorneys specialized in these areas of law “find it difficult to research in a meaningful fashion.”<sup>19</sup> An important first step in a clear understanding of these complex programs is knowing the following definitions.

Medicaid is a medical assistance<sup>20</sup> program providing health care insurance coverage to categorically needy groups, including eligible low-income adults, children, pregnant women, the elderly, the blind, and individuals with disabilities.<sup>21</sup> Funded jointly by States and the federal

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<sup>17</sup> See *Disability*, *Black's Law Dictionary* (11th ed. 2019); *Permanent Disability*, *Black's Law Dictionary* (11th ed. 2019).

<sup>18</sup> Americans with Disabilities Act of 1990, § 2(a)(8) (codified as 42 U.S.C. § 12101(a)(7)). See also Goodman et al., *supra* note 13, at 1 (“Many means-tested public benefits in the U.S. impose asset and income limits, but do not take the additional costs of disability into consideration.”).

<sup>19</sup> E-mail from Lindsay C. Jones, Att’y, Schraff Thomas Law, LLC, to Megan C. Parker, Assoc. Ed., Akron L. Rev. (Sept. 23, 2021, 11:18 AM EST) [hereinafter Sept. 23 Email from Lindsay C. Jones] (on file with author).

<sup>20</sup> See 42 U.S.C. § 1396d(a) (2021) (defining “medical assistance”); OHIO ADMIN. CODE 5160:1-1-01(B)(47) (2017) (defining “medical assistance”).

<sup>21</sup> 2 MARILYN E. PHELAN, *NONPROFIT ORGANIZATIONS: LAW AND TAXATION* 2d § 21:6, Westlaw NPOLT (updated Sept. 2021).

government, Medicaid is administered by each individual State<sup>22</sup> under guidance from the Centers for Medicare & Medicaid Services (“CMS”).<sup>23</sup>

Specifically in Ohio, there are three categories of Medicaid programs available to individuals with disabilities: (1) long term care (“LTC”) and skilled nursing facility (“SNF”); (2) home- and community-based services (“HCBS”) waivers; and (3) aged, blind, or disabled (“ABD”) Medicaid.<sup>24</sup> The following table provides the income (monthly) and asset limitations for these three Ohio Medicaid programs.<sup>25</sup>

**Figure 1**

2021 Ohio Medicaid Income & Asset Limitations for Eligibility						
Medicaid	Single		Married (Two Applicants)		Married (One Applicant)	
	Income Limit	Asset Limit	Income Limit	Asset Limit	Income Limit	Asset Limit
<b>LTC / SNF</b>	\$2,382	\$2,000	\$4,764	\$3,000	\$2,382	\$2,000
<b>HCBS</b>	\$2,382	\$2,000	\$4,764	\$3,000	\$2,382	\$2,000
<b>ABD</b>	\$794	\$2,000	\$1,191	\$3,000	\$1,191	\$3,000

Medicare is a federal health care insurance program, administered by CMS, for: (1) the elderly (aged 65 or older); (2) young persons (under age 65) with certain disabilities; and (3) persons, regardless of age, with End-Stage Renal Disease (permanent kidney failure requiring dialysis or kidney transplant).<sup>26</sup>

<sup>22</sup> Christie Provost & Paul Hughes, *Medicaid: 35 Years of Service*, 22(1) HEALTH CARE FIN. REV. 141, 142 (2002), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4194689/pdf/hcfr-22-1-141.pdf>, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4194689/> [<https://perma.cc/CRT8-YL6X>] (“Each State establishes its own eligibility standards, benefits package, payment rates, and program administration under broad Federal guidelines. As a result, there are essentially 56 different Medicaid programs—one for each State, territory, and the District of Columbia”).

<sup>23</sup> See *Medicaid*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/index.html> [<https://perma.cc/6UNH-C7TM>] (last visited Oct. 15, 2021); *Federal Policy Guidance*, MEDICAID.GOV, <https://www.medicaid.gov/federal-policy-guidance/index.html> [<https://perma.cc/JPN5-J3NF>] (last visited Oct. 15, 2021).

<sup>24</sup> See *infra* Part II.C. (discussing Ohio’s three Medicaid programs for individuals with disabilities).

<sup>25</sup> Am. Council on Aging, *Ohio Medicaid Income & Asset Limits for Nursing Homes & In-Home Long Term Care*, MEDICAIDPLANNINGASSISTANCE.ORG, <https://www.medicaidplanningassistance.org/medicaid-eligibility-ohio/> [<https://perma.cc/34LX-3WDM>] [hereinafter *2021 Ohio Medicaid Income & Asset Limits*] (last updated Dec. 16, 2020).

<sup>26</sup> See PHELAN, *supra* note 21, § 21:5 (“A federally subsidized health insurance program, commonly known as the Medicare Act,[] provides insurance for the cost of hospital and related posthospital services for the elderly and the



The Supplemental Security Income (“SSI”) program, funded by general taxes rather than Social Security taxes, is administered by the Social Security Administration (“SSA”).<sup>27</sup> SSI provides monthly cash assistance payments to adults and children who have: (1) a disability or are blind and (2) income and resources below specified limits to meet food, clothing, and shelter needs.<sup>28</sup> Although there is a base federal benefit rate,<sup>29</sup> the amount of cash assistance a person receives each month will depend on multiple factors—including living arrangements, countable income and resources, and which State a person resides in.<sup>30</sup>

Income includes cash, in-kind income<sup>31</sup>, or something of value received, available, and attributable to a person, including receipt of an item which can, directly or by sale or conversion, meet the needs of such person.<sup>32</sup> “Earned income” is cash or in-kind income received as payment

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disabled.”) (footnote omitted); *Medicare Program – General Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Medicare/Medicare-General-Information/MedicareGenInfo> [<https://perma.cc/GKQ2-V8LQ>] (last modified Jan. 14, 2021, 9:55 AM); *What’s Medicare*, MEDICARE.GOV, <https://www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare> [<https://perma.cc/B78D-VTMD>] (last visited Oct. 15, 2021).

<sup>27</sup> Soc. Sec. Admin., *Supplemental Security Income (SSI) Overview*, UNDERSTANDING SUPPLEMENTAL SECURITY INCOME SSI BENEFITS -- 2021 EDITION, [hereinafter UNDERSTANDING SSI BENEFITS] <https://www.ssa.gov/ssi/text-over-ussi.htm> [<https://perma.cc/7FAV-ZET9>] (last visited Nov. 11, 2021) (“Social Security benefits may be paid to you and certain members of your family if . . . you worked long enough and paid Social Security taxes. [However,] SSI benefits are not based on your prior work or a family member’s prior work”).

<sup>28</sup> Soc. Sec. Admin., *Supplemental Security Income*, [hereinafter *Supplemental Security Income*] <https://www.ssa.gov/benefits/ssi/> [<https://perma.cc/MWM5-DG2R>] (last visited Nov. 11, 2021) (“The base monthly federal amount varies depending on your living arrangement and countable income”).

<sup>29</sup> UNDERSTANDING SSI BENEFITS, *supra* note 27 (“Generally, the maximum Federal SSI benefit changes yearly . . . Effective January 1, 2021 the Federal benefit rate [was] \$794 for an individual and \$1,191 for a couple”).

<sup>30</sup> *Supplemental Security Income*, *supra* note 28 (“Not everyone gets the same amount”); UNDERSTANDING SSI BENEFITS, *supra* note 28 (“SSI benefit amounts and State supplemental payment amounts vary based upon your income, living arrangements, and other factors”).

<sup>31</sup> OHIO ADMIN. CODE 5160:1-1-01(B)(37) (2021) (“[A]ny benefit received other than cash such as food, shelter, or something that can be used to get food or shelter”).

<sup>32</sup> *Id.* at (B)(32) (2021) (defining “income” for Medicaid purposes). *See id.* at (B)(21) (2021) (“‘Excluded income’ means income that state or federal law prohibits from consideration in determining eligibility for medical assistance”); *id.* at (B)(53) (2021) (“‘Non-excluded income’ means income (earned or unearned) that is used in the eligibility determination for medical assistance”).

for services completed as employment, including wages, salary, or commissions from which income taxes are paid or withheld.<sup>33</sup>

Resources (also referred to as assets) include “cash, funds held within a financial institution, investments, personal property, and real property an individual and/or the individual's spouse has an ownership interest in, has the legal ability to access in order to convert to cash, and is not legally prohibited from using for support and maintenance.”<sup>34</sup> Under Medicaid, individuals are subject to a resource limit: “the maximum combined value of all resources an individual can have an ownership interest in and still qualify for medical assistance.”<sup>35</sup>

## *B. Crash Course in Medicaid and Social Security Laws*

### 1. A Brief Historical and Legislative Overview of the Programs.

President Theodore Roosevelt advocated for each State to pass legislation to create social health insurance programs for the working classes.<sup>36</sup> During President Franklin D. Roosevelt's first term in office, Congress passed the Social Security Act of 1935 (“Social Security Act”) containing old-age insurance, unemployment compensation, and maternal and child health programs but not a social health insurance program, believing this type of program would be too controversial.<sup>37</sup> After three pieces of legislation amending the Social Security Act still did not

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<sup>33</sup> *Id.* at (B)(16) (defining “earned income” for Medicaid purposes); *see also Id.* at (B)(82) (defining “unearned income” for Medicaid purposes).

<sup>34</sup> *Id.* at (B)(72) (2021) (defining “resources” for Medicaid purposes).

<sup>35</sup> OHIO ADMIN. CODE 5160:1-3-05.1(B)(8) (2021) (“‘Resource limit’ means the maximum combined value of all resources an individual can have an ownership interest in and still qualify for medical assistance.”). *See also id.* at (B)(1) (“‘Countable resources’ mean those resources remaining after all exclusions have been applied.”).

<sup>36</sup> Ctrs. for Medicare & Medicaid Servs., *Tracing the History of CMS Programs: From President Theodore Roosevelt to President George W Bush*, 1 [hereinafter *Tracing the History of CMS Programs*] <https://www.cms.gov/About-CMS/Agency-Information/History/Downloads/BushSignMMA2003.pdf> (last visited Sept. 23, 2021).

<sup>37</sup> *Id.* (“Although important administration officials, such as relief administrator Harry Hopkins, favored the passage of health insurance, President Roosevelt decided that it was too controversial to include in his proposed Social Security Act and sent the issue off for further study.”).

create nor implement a national health insurance program,<sup>38</sup> President Harry Truman proposed and later signed into law the Social Security Act Amendments of 1950 (“1950 Amendments”).<sup>39</sup> The 1950 Amendments provided States with federal funding to pay for the medical care of poor, aged citizens and “became the foundation for the Medicaid Program.”<sup>40</sup>

After the enactment of the 1950 Amendments, two things happened: (1) much Congressional debate occurred regarding enactment of a national health insurance program while (2) Presidents continued attempts to pass such legislation.<sup>41</sup> First, President Dwight D. Eisenhower passed several pieces of legislation during his presidency aimed at progressing services for individuals with disabilities.<sup>42</sup> Then, President John F. Kennedy intensely bargained with members of Congress for health insurance legislation during his presidency, but he died before such legislation passed.<sup>43</sup>

Thirty years after Congress first passed the Social Security Act, President Lyndon B. Johnson signed the Social Security Amendments of 1965 (“1965 Amendments”), enacting

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<sup>38</sup> See Soc. Sec. Admin., *Legislative History: 1939 Amendments*, <https://www.ssa.gov/history/1939amends.html> [<https://perma.cc/SGG2-BACM>] [hereinafter *Legislative History: 1939 Amendments*] (last visited Oct. 13, 2021); Angela J. Murray, *Social Security Act Amendments of 1946*, 9.9 SOC. SEC. BULL. 2 (Sept. 1946), <https://www.ssa.gov/policy/docs/ssb/v9n9/v9n9p2.pdf>; *Social Security Legislation in 1947*, 10.9 SOC. SEC. BULL. 13 (Sept. 1947), <https://www.ssa.gov/policy/docs/ssb/v10n9/v10n9p13.pdf>.

<sup>39</sup> Wilber J. Cohen & Robert J. Myers, *Social Security Act Amendments of 1950: A Summary and Legislative History*, 13(10) SOC. SEC. BULL. 3 (Oct. 1950), <https://www.ssa.gov/policy/docs/ssb/v13n10/v13n10p3.pdf>; see also Soc. Sec. Admin., *Research, Statistics & Policy Analysis: Social Security Bulletin Archives*, <https://www.ssa.gov/policy/docs/ssb/archives-list.html> [<https://perma.cc/MCV3-DFAP>] (last visited Oct. 13, 2021).

<sup>40</sup> *Tracing the History of CMS Programs*, *supra* note 36, at 2 (“In 1950, [President Harry Truman] signed the Social Security Amendments, which provided federal funds to states for vendor payments for medical care of poor aged called Old-Age Assistance; it became the foundation for the Medicaid program.”).

<sup>41</sup> *Id.* at 2–3 (listing Congressional opponents of President Roosevelt and President Truman’s approaches to a national health insurance program).

<sup>42</sup> *Id.* at 2 (“In 1954, vocation rehabilitation legislation was passed for states to help the disabled return to work. In 1956, in a significant expansion of Social Security Benefits, President Eisenhower signed the disability insurance program into law.”).

<sup>43</sup> *Id.* at 3 (“The closest he came to his goal was a vote in the Senate on July 17, 1962 . . . [where] the administration lost by 4 votes: a count of 52 to 48”).

Medicare and Medicaid as Title XVIII and XIX of the Social Security Act.<sup>44</sup> To commemorate President Truman’s first legislative steps toward a national health insurance program, President Johnson formally signed these two programs into law at the Harry S. Truman President Library.<sup>45</sup> A substantial portion of the 1965 Amendments were based on a portion of the Social Security Amendments of 1960, known as the Kerr Mills Act, including provisions for States to have a single agency and list of requirements for State Medicaid Plans.<sup>46</sup>

In the following years, the government enacted several pieces of legislation amending the Social Security Act, including the Social Security Amendments of 1967 (“1967 Amendments”), the Social Security Amendments of 1972 (“1972 Amendments”), and the Omnibus Budget Reconciliation Act of 1981 (“OBRA ‘81”).<sup>47</sup> First, the 1967 Amendments changed Medicaid eligibility from receipt of cash assistance to a determination based on income and resources.<sup>48</sup>

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<sup>44</sup> *Id.* at 3 (“Medicare and Medicaid were enacted as Title XVIII and Title XIX of the Social Security Act. Medicare extended health coverage to almost all Americans aged 65 or older . . .”); *Id.* at 4 (“Medicaid provided health care services to those receiving welfare benefits: low-income children deprived of parental support and their caretaker relatives, the elderly, the blind, and individuals with disabilities.”).

<sup>45</sup> Dr. Howard Markel, *69 Years Ago, a President Pitches His Idea for National Health Care*, PBS NEWS HOUR (Nov. 19, 2014, 2:20 PM) <https://www.pbs.org/newshour/health/november-19-1945-harry-truman-calls-national-health-insurance-program> [<https://perma.cc/N49F-Q35J>] (“As LBJ handed ‘Give ‘Em Hell Harry’ and Bess the pens he used to affix his signature to the document, the President proclaimed Mr. Truman as ‘the real daddy of Medicare’”).

<sup>46</sup> Judith D. Moore & David G. Smith, *Legislating Medicaid: Considering Medicaid and Its Origins*, 27(2) HEALTH CARE FIN. REV. 45, 48 (2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4194918/pdf/hcfr-27-2-045.pdf>, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4194918/> [<https://perma.cc/B6UB-N4JN>] (“[T]he Kerr-Mills Act . . . extend[ed] medical benefits to a new category . . . the medically indigent—persons age 65 or over, not receiving old age assistance cash payments, but whose incomes would be “. . . insufficient to meet the costs of necessary medical services . . .”); see also Social Security Amendments of 1960 (Kerr-Mills Social Security Act), Pub. L. No. 86-778, 74 Stat. 924 (1960).

<sup>47</sup> Provost & Hughes, *supra* note 22, at 144–45 (listing major legislative milestones for the Medicaid program); see also Medicaid & CHIP Payment & Access Comm’n, *Federal Legislative Milestones in Medicaid and CHIP*, MACPAC.GOV, <https://www.macpac.gov/reference-materials/federal-legislative-milestones-in-medicaid-and-chip/> [<https://perma.cc/HN5D-QFVE>] [hereinafter *Federal Legislative Milestones in Medicaid and CHIP*] (last updated Dec. 2018).

<sup>48</sup> *Federal Legislative Milestones in Medicaid and Chip*, *supra* note 47 (“limit[ed] Medicaid eligibility to the medically needy, that is, individuals with income below 133½ percent of the AFDC maximum payment level for a given family size in a state.”); see also Provost & Hughes, *supra* note 22 (“Over time, legislative changes to the Medicaid program and the AFDC welfare program have led to the creation of certain Medicaid groups where eligibility is based solely on income and resources, not receipt of cash assistance.”).

Next, the 1972 Amendments created the Supplemental Security Income (“SSI”) program: a federal cash assistance program for certain low-income individuals.<sup>49</sup> Third, OBRA ’81 established two new types of Medicaid waivers.<sup>50</sup> One waiver, known as the freedom-of-choice waiver, allowed States to enroll certain Medicaid populations in mandatory managed care.<sup>51</sup> The second waiver, HCB waivers, allow States to pay for long-term care services provided in a home or community setting to the elderly and individuals with disabilities.<sup>52</sup>

## 2. Federal Requirements for State Medical Assistance Plans.

Federal law provides broad guidelines States must comply with in creating their individual plans for Medicaid coverage.<sup>53</sup> As a result, there are multiple Medicaid programs in existence, including one for each State, territory, and the District of Columbia.<sup>54</sup> One federal requirement is States’ plans must:

include *reasonable standards* . . . for determining eligibility for the extent of medical assistance under the plan which . . . provide for taking into account only such income and resources as are . . . available to the applicant or recipient . . . [and] provide for *reasonable evaluation* of any such income or resources . . . .<sup>55</sup>

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<sup>49</sup> *Federal Legislative Milestones in Medicaid and Chip*, *supra* note 47 (“create[d] the Supplemental Security Income (SSI) program to federalize cash assistance for the aged, blind, and permanently and totally disabled, which entitles SSI beneficiaries to Medicaid coverage”).o

<sup>50</sup> Provost & Hughes, *supra* note 22, at 144 (“**1981**—Freedom of choice waivers (1915b) and home and community-based care waivers (1915c) are established”) (emphasis in original).

<sup>51</sup> *Federal Legislative Milestones in Medicaid and Chip*, *supra* note 47 (“Section 1915(b) . . . waivers, which allow states to pursue mandatory managed care enrollment of certain Medicaid populations”).

<sup>52</sup> *Id.* (“Section 1915(c) . . . waivers, which allow states to cover home- and community-based long-term care services for the elderly and individuals with disabilities who are at risk of institutional care”).

<sup>53</sup> Provost & Hughes, *supra* note 22 (“Each State establishes its own eligibility standards, benefits package, payment rates, and program administration under broad Federal guidelines.”).

<sup>54</sup> *Id.* (“As a result, there are essentially 56 different Medicaid programs—one for each State, territory, and the District of Columbia.”).

<sup>55</sup> 42 U.S.C. § 1396a(a)(17) (2018) (emphasis added); *see also* Miller v. Ibarra, 746 F. Supp. 19, 23 (D. Colo. 1990) (citing Dep’t of Health Servs. of State of Cal., v. Sec’y of Health & Hum. Servs., 823 F.2d 323, 325 (9th Cir. 1987)).

Second, in relation to the treatment of certain trusts when income or resources are placed in them, States' medical assistance plans must follow the provisions laid out in 42 U.S.C. § 1396p because certain trusts waive the income and resource restrictions for Medicaid eligibility.<sup>56</sup>

Further, federal guidance requires States' plans to:

provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with *simplicity of administration* and the *best interests of the recipients* . . . .<sup>57</sup>

Additionally, federal guidance identifies certain populations and eligibility groups that States must provide medical assistance coverage to as well as other groups States may choose to cover.<sup>58</sup> The required eligibility groups for State plan coverage include: certain low-income families, poverty-related groups, current and some former SSI recipients, foster care and adoption assistance, and certain Medicare beneficiaries.<sup>59</sup> The optional eligibility groups include: poverty-related groups with income over 133% of the federal poverty level ("FPL"), the medically needy, State supplementary payment ("SSP") recipients, persons receiving long-term care services, and working individual with disabilities.<sup>60</sup> In 2021, the FPL for a single-person household

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<sup>56</sup> 42 U.S.C. § 1396a(a)(18) ("comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts"). See *infra* Part IV.C. (discussion of how income and resources are treated for Medicaid eligibility when placed in special needs trusts and qualified income trusts).

<sup>57</sup> *Id.* § (a)(19).

<sup>58</sup> Provost & Hughes, *supra* note 22 ("The Medicaid statute identifies certain populations that States are required to cover and other populations that States may choose to cover.").

<sup>59</sup> *Id.* at 142–43 (listing the required eligibility groups for State plans); see also 42 C.F.R. Ch. IV, Subch. C, Pt. 435, Subpt. B.

<sup>60</sup> Provost & Hughes, *supra* note 22, at 143 ("States also have the discretion to expand eligibility beyond these optional groups"); see also 42 C.F.R. Ch. IV, Subch. C, Pt. 435, Subpt. C–D.

was \$12,880.<sup>61</sup> The FPL for a single-person household increased in 2022 up to \$13,590.<sup>62</sup> Further, “States may provide Medicaid services to individuals who do not meet standard Medicaid financial or categorical requirements.”<sup>63</sup>

### 3. Medicaid Eligibility Criteria and Determinations: 1634 versus 209(b) States.

When determining Medicaid eligibility for aged, blind, or disabled individuals, States have the option of following the SSI eligibility criteria set forth by the SSA or using more restrictive criteria.<sup>64</sup> States using the SSI eligibility criteria are known as 1634 States while States using more restrictive eligibility criteria are known as 209(b) States.<sup>65</sup> As of August 1, 2016, “Ohio transitioned from being a 209(b) state to a 1634 state for Medicaid eligibility.”<sup>66</sup>

<sup>61</sup> Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. 7732-01, 7733 (Feb. 1, 2021) (listing 2021 poverty guidelines based on persons in a family/household); *see also* Anne Marie Costello, Deputy Adm’r & Dir., Ctrs. for Medicaid & Chip Servs., *2021 Federal Poverty Level Standards*, CMCS INFO. BULL., 2 (Mar. 18, 2021) [hereinafter *2021 Federal Poverty Level Standards*], available at [https://www.medicaid.gov/federal-policy-guidance/index.html?search\\_api\\_fulltext=2021%20Federal%20Poverty%20Level%20Standards&field\\_fpg\\_date%5Bmin%5D=&field\\_fpg\\_date%5Bmax%5D=&sort\\_by=field\\_fpg\\_date&sort\\_order=DESC&items\\_per\\_page=10&f%5B0%5D=fpg\\_type\\_facet%3A1481#content#content#content#content](https://www.medicaid.gov/federal-policy-guidance/index.html?search_api_fulltext=2021%20Federal%20Poverty%20Level%20Standards&field_fpg_date%5Bmin%5D=&field_fpg_date%5Bmax%5D=&sort_by=field_fpg_date&sort_order=DESC&items_per_page=10&f%5B0%5D=fpg_type_facet%3A1481#content#content#content#content).

<sup>62</sup> Annual Update of the HHS Poverty Guidelines, 87 Fed. Reg. 3315-01, 3316 (Jan. 21, 2022) (listing 2022 poverty guidelines based on persons in a family/household); *see also* Daniel Tsai, Deputy Adm’r & Dir., Ctrs. for Medicaid & Chip Servs., *2022 Federal Poverty Level Standards*, CMCS INFO. BULL., 2 (Feb. 24, 2022) [hereinafter *2022 Federal Poverty Standards*], available at [https://www.medicaid.gov/federal-policy-guidance/index.html?f%5B0%5D=fpg\\_type\\_facet%3A1481&search\\_api\\_fulltext=2022+Federal+Poverty+Level+Standards&field\\_fpg\\_date%5Bmin%5D=&field\\_fpg\\_date%5Bmax%5D=&sort\\_by=field\\_fpg\\_date&sort\\_order=DESC&items\\_per\\_page=10#content#content#content](https://www.medicaid.gov/federal-policy-guidance/index.html?f%5B0%5D=fpg_type_facet%3A1481&search_api_fulltext=2022+Federal+Poverty+Level+Standards&field_fpg_date%5Bmin%5D=&field_fpg_date%5Bmax%5D=&sort_by=field_fpg_date&sort_order=DESC&items_per_page=10#content#content#content).

<sup>63</sup> Provost & Hughes, *supra* note 22, at 143 (“This discretion has aided States significantly in their health care reform efforts.”).

<sup>64</sup> 42 C.F.R. § 435.120 (2021) (“the agency must provide Medicaid to aged, blind, and disabled individuals or couples who are receiving or are deemed to be receiving SSI.”); *see also* Provost & Hughes, *supra* note 22, at 143–44 (“States are generally required to provide Medicaid to recipients of SSI. States, however, may use more restrictive eligibility standards for Medicaid than those used for SSI if they were using those standards prior to the enactment of SSI in 1972.”).

<sup>65</sup> Soc. Sec. Admin., *SI 01715.010 Medicaid and the Supplemental Security (SSI) Program*, PROGRAM OPERATIONS MANUAL SYS., (A)(1), (3) <https://secure.ssa.gov/poms.nsf/lnx/0501715010> [<https://perma.cc/J85V-VRKD>] [hereinafter *Medicaid and the SSI Program*] (last updated Oct. 2, 2017); *see also* *Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/eligibility/index.html> [<https://perma.cc/M9VQ-7TVF>] (last visited Oct. 20, 2021) (“Medicaid eligibility for individuals 65 and older or who have blindness or a disability is generally determined using the income methodologies of the SSI program . . . (some states, known as 209(b) states, use certain more restrictive eligibility criteria than SSI, but still largely apply SSI methodologies).”).

<sup>66</sup> Letter from John B. McCarthy, Dir., Ohio Dep’t of Medicaid, to All Medicaid Eligibility Manual Holders, <https://medicaid.ohio.gov/static/About+Us/PoliciesGuidelines/MEMTL/MEMTL-125.pdf> [<https://perma.cc/W3FN-6VMV>] [hereinafter Letter from John McCarthy to Medicaid Eligibility Manual Holders], available at <https://>

Section 1634(a) of the Social Security Act allows States to enter into an agreement (known as a 1634 agreement) with the SSA Commissioner where the SSA Commissioner will determine Medicaid eligibility for aged, blind, or disabled individuals using SSI eligibility criteria.<sup>67</sup> Therefore, in 1634 States, “an SSI application is also an application for Medicaid.”<sup>68</sup> Whereas, in all other states, “an individual must file an application with the State/local Medicaid agency to be eligible for Medicaid, even if [they] receive[] a federally administered payment (SSI/SSP).”<sup>69</sup>

Section 1902(f) of the Social Security Act allows States (known as 209(b) States), under certain conditions, to apply more restrictive Medicaid eligibility criteria for aged, blind, or disabled individuals than the criteria used for SSI eligibility.<sup>70</sup> States that choose to use this option “may not use more restrictive standards than those in effect January 1, 1972 and must provide for deducting incurred medical expenses from income though Medicaid spenddown so that individuals may reduce their income to the income eligibility level.”<sup>71</sup>

### C. Ohio Medicaid Programs for Individuals with Disabilities

#### 1. Long-Term Care and Skilled Nursing Facility.

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[medicaid.ohio.gov/wps/portal/gov/medicaid/resources-for-providers/policies-guidelines/medicaid-eligibility-man-trans-letters/medicaid-eligibility-manual-transmittal-letters](https://www.medicaid.ohio.gov/wps/portal/gov/medicaid/resources-for-providers/policies-guidelines/medicaid-eligibility-man-trans-letters/medicaid-eligibility-manual-transmittal-letters) [<https://perma.cc/BV4U-J6MQ>].

<sup>67</sup> Social Security (Old Age Pension) Act, ch. 531, 49 Stat. 620 (1935), § 1634(a) (codified as amended at 42 § 1383c(a)) (“The Commissioner of Social Security may enter into an agreement with any State which wishes to do so under which the Commissioner will determine eligibility for medical assistance in the case of aged, blind, or disabled individuals under such State’s plan approved under subchapter XIX.”); *see also* Soc. Sec. Admin., *Organizational Structure of the Social Security Administration*, SSA ORGANIZATIONAL MANUAL: CHAPTER S – SOC. SEC. ADMIN., <https://www.ssa.gov/org/orgOC.htm> [<https://perma.cc/DH59-R7VU>] [hereinafter *Organizational Structure of the SSA*] (last visited Feb. 27, 2022).

<sup>68</sup> Soc. Sec. Admin., *SI 01730.005 Social Security Administration/State Agreements under Section 1634*, PROGRAM OPERATIONS MANUAL SYS., <https://secure.ssa.gov/poms.nsf/lnx/0501730005> [<https://perma.cc/QZK9-YBB6>] [hereinafter *SSA and State Agreements under Section 1634*] (last updated Feb. 6, 2013).

<sup>69</sup> *Id.* (discussing the different requirements for SSI applications in different states).

<sup>70</sup> Social Security (Old Age Pension) Act, § 1902(f) (codified as amended at 42 U.S.C. § 1396a(f)) (“in addition to meeting such other requirements as are or may be imposed under the State plan”). *See* Social Security Amendments of 1972, Pub. L. 92-603, 86 Stat. 1329 (1972), § 209(b) (amending § 1902 of the Social Security Act).

<sup>71</sup> *Medicaid and the SSI Program*, *supra* note 65, at (A)(1) (emphasis omitted).



“Medicaid is the primary source of LTC insurance for the elderly and people with disabilities, including middle-income individuals who spend down their financial resources.”<sup>72</sup> Originally, Medicaid’s coverage of LTC was restricted to institutional settings, “often referred to as institutional Medicaid or nursing home Medicaid.”<sup>73</sup> These programs assist the elderly and individuals with disabilities with daily living activities, such as bathing, mobility, and eating as well as cover costs of skilled nursing and administration of medicine.<sup>74</sup> Medicaid has since expanded the locations in which the elderly and individuals with disabilities can live and receive LTC services and supports.<sup>75</sup> In order to qualify for LTC services, an individual must meet the general Medicaid eligibility criteria and “[h]ave a functional need for long term care.”<sup>76</sup>

## 2. Home and Community-Based Services Waivers.

“Although most LTC is for institutional care, Medicaid has made great strides in shifting the delivery of services to home and community-based settings.”<sup>77</sup> Authorized by Section 1915 of the Social Security Act,<sup>78</sup> these waivers allow States to provide LTC services and supports to the elderly or individuals with disabilities who prefer to live in their home or community rather than

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<sup>72</sup> Provost & Hughes, *supra* note 22, at 147 (“The most significant trend in Medicaid services is the growth in LTC expenditures.”).

<sup>73</sup> Am. Council on Aging, *Answers to All of Your Questions About Medicaid Long Term Care*, MEDICAIDPLANNINGASSISTANCE.ORG, <https://www.medicaidplanningassistance.org/medicaid-long-term-care-faq/> [<https://perma.cc/6WUW-9Y2T>] [hereinafter *Answers to Questions About Medicaid LTC*] (last updated Jan. 28, 2021).

<sup>74</sup> *Id.* (“Medicaid covers the cost of room and board, assistance with activities of daily living (i.e., bathing, mobility, and eating), skilled nursing, and medication administration.”); *see also* Provost & Hughes, *supra* note 22, at 147 (“Medicaid covers skilled nursing facility care, intermediate care facilities for the mentally retarded and developmentally disabled, and home and community-based services.”).

<sup>75</sup> *Answers to Questions About Medicaid LTC*, *supra* note 73 (“Please note that while Medicaid may cover the cost of long term services and supports in an adult foster care home or an assisted living residence, Medicaid will not pay for the room and board portion of living in such locations.”).

<sup>76</sup> *Id.* (listing requirements for applicants to qualify for the long-term care Medicaid program).

<sup>77</sup> Provost & Hughes, *supra* note 22, at 148.

<sup>78</sup> Social Security (Old Age Pension) Act, ch. 531, 49 Stat. 620 (1935), § 1915(c) (codified as amended at 42 § 1396n(c)).

in an institution.<sup>79</sup> In order for States to enact and use HCBS waiver programs, they must show that “providing waiver services won’t cost more than providing these services in an institution,” that such services “ensure the protection of people’s health and welfare,” and that such services “follow an individualized and person-centered plan of care.”<sup>80</sup> Eligibility for each specific State HCBS waiver depends on which group of individuals the waiver is aimed at providing services for:

Within these target groups, states are also permitted to establish additional criteria to further target the population to be served on a HCBS waiver . . . . Eligible individuals must demonstrate the need for a Level of Care that would meet the state’s eligibility requirements for services in an institutional setting.<sup>81</sup>

The services covered by HCBS waivers can range from standard medical services to non-medical services, or even a combination of both.<sup>82</sup>

### 3. Aged, Blind, or Disabled Medicaid.

While ABD are three distinct Medicaid categories at the federal level,<sup>83</sup> Ohio’s single ABD Medicaid program covers health care and medical expenses for older adults and individuals with

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<sup>79</sup> *Home & Community-Based Services 1915(c)*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-authorities/home-community-based-services-1915c/index.html> [<https://perma.cc/A7HQ-WG6W>] (last visited Jan. 23, 2022); see also Provost & Hughes, *supra* note 22, at 148 (“Medicaid’s home and community-based services waiver program (i.e., 1915(c) waivers) affords States the flexibility to develop and implement creative alternatives to institutionalizing Medicaid-eligible individuals.”).

<sup>80</sup> *Home & Community-Based Services 1915(c)*, *supra* note 79.

<sup>81</sup> *Id.* (“This waiver enables states to tailor services to meet the needs of a particular target group.”); see also Provost & Hughes, *supra* note 22, at 148 (“States are using these programs to provide services to a diverse LTC population, including the elderly, individuals with physical and developmental disabilities, those with chronic mental illness, mental retardation, and persons with AIDS.”).

<sup>82</sup> *Home & Community-Based Services 1915(c)*, *supra* note 79 (“States can offer a variety of unlimited services under an HCBS Waiver program. Programs can provide a combination of standard medical services and non-medical services.”); see also Provost & Hughes, *supra* note 22, at 148 (“States have the flexibility to design a waiver program and select the mix of services including certain non-medical, social and supportive services to best meet the needs of the population they want to serve in the home or community.”).

<sup>83</sup> Sept. 23 Email from Lindsay C. Jones, *supra* note 19 (“There are also a lot more Medicaid programs than just ABD, which in itself is actually three different categories at the federal level, as they have different definitions and different benefits can apply.”).

disabilities in the form of different benefit packages.<sup>84</sup> As Ohio’s SSI look-alike beneficiaries,<sup>85</sup> applicants must be: (1) 65 years or older, (2) considered legally blind,<sup>86</sup> or (3) an individual with a disability as defined and classified by the SSA<sup>87</sup> in addition to meeting basic Medicaid requirements.<sup>88</sup> The individual county departments of job and family services (“CDJFS”) make determinations of age, while either the SSA or Ohio Department of Medicaid (“ODM”) makes determinations of disability and blindness.<sup>89</sup>

### III. STATEMENT OF THE CASE

Persons with permanent disabilities should not be subject to an income or asset limit in determining and/or maintaining their Medicaid eligibility. Persons with disabilities rely on health insurance to cover treatment and/or health maintenance costs. Although private insurance companies are no longer legally allowed to deny providing health insurance to persons with disabilities based on pre-existing conditions, private insurance companies do not always cover the costs of treatment, medical equipment, health maintenance, etc.

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<sup>84</sup> Ohio Dep’t of Medicaid, *Aged, Blind, or Disabled (ABD) Medicaid*, <https://medicaid.ohio.gov/wps/portal/gov/medicaid/families-and-individuals/citizen-programs-and-initiatives/aged-blind-disabled> [<https://perma.cc/G2TE-TAJX>] [hereinafter *ABD Medicaid*] (last visited Oct. 21, 2021).

<sup>85</sup> Sept. 23 Email from Lindsay C. Jones, *supra* note 19 (“our SSI look-alike (categorically needy) program”); *see also* E-mail from Lindsay C. Jones, Att’y, Schraff Thomas Law, LLC, to Megan C. Parker, Assoc. Ed., Akron L. Rev. (Sept. 24, 2021, 7:12 PM EST) [hereinafter Sept. 24 E-mail from Lindsay C. Jones] (on file with author) (“our categorically needing grouping, where their income is at SSI level but they don’t actually receive SSI”).

<sup>86</sup> OHIO ADMIN. CODE 5160:1-3-02(A)(2) (2021) (“A person is considered to be blind if [they have] central visual acuity of 20/200 or less in the better eye with correcting glasses, or a limited visual field or twenty degrees or less in the better eye.”).

<sup>87</sup> *Id.* at (A)(3) (“Disability is defined differently for adults and children.”); *ABD Medicaid*, *supra* note 84 (“An individual with a disability (as classified by the Social Security Administration) . . .”).

<sup>88</sup> Ohio Dep’t of Medicaid, *Who Qualifies*, <https://medicaid.ohio.gov/wps/portal/gov/medicaid/families-and-individuals/coverage/who-qualifies/who-qualifies> [<https://perma.cc/MRZ7-7269>] [hereinafter *Who Qualifies*] (last visited Oct. 21, 2021).

<sup>89</sup> OHIO ADMIN. CODE 5160:1-3-02(A)(1) (2021) (“Verification of age is required”); *id.* at (A) (“Blindness and disability are determined by either the [SSA] or [ODM] in accordance with rule 5160:1-3-02.9 of the Administrative Code.”); *id.* at (B) (“If SSA makes a finding of presumptive disability based upon the available evidence with reflects a high degree of probability . . . the applicant . . . meets the disability requirements necessary to qualify for medical assistance”).

Adults with disabilities are twice as likely to have income under the poverty threshold due to a lesser likelihood of being employed as well as having lower wages, on average, than their non-disabled counterparts.<sup>90</sup> Researchers believe “a household containing an adult with a disability that limits their ability to work requires, on average, 28 percent more income (or an additional \$17,690 a year) to obtain the same standard of living as a similar household without a member with a disability.”<sup>91</sup> By imposing Medicaid eligibility income and asset limitations on persons with permanent disabilities, Medicaid and Social Security programs are in direct conflict with Congress’ explicitly stated goals in enacting the ADA.<sup>92</sup> “The result is that many people with disabilities may be viewed as financially able and, thus, denied assistance even though the reality of their extra disability-related expenditures places them in a tenuous financial position.”<sup>93</sup>

Remember the law student from the Introduction who just received an offer to join a law firm for the summer as one of their 1L diversity fellows? This law student is me. Although the solution was anything but favorable, I had to open a Medicaid Payback Trust to receive the income from my first summer job during law school as a 1L diversity fellow.<sup>94</sup> My income again went into this Medicaid Payback Trust when I returned to the same law firm as a 2L summer associate in 2022. Meanwhile, until the law changes to disregard all income for persons with permanent disabilities, any income that I receive from this law firm after graduating law school and passing

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<sup>90</sup> Goodman et al., *supra* note 13 (“Working-age adults with disabilities are twice as likely as those without disabilities to have incomes under the poverty threshold. They are less likely to be employed than their peers without disabilities and, even among those who are employed, they have lower wages on average than those without disabilities.”).

<sup>91</sup> *Id.* at 1 (listing researchers from Stony Brook University, the University of Tennessee, National Disability Institute, and the Oxford Institute of Population Ageing) (emphasis omitted).

<sup>92</sup> Americans with Disabilities Act of 1990, § 2(a)(8) (codified as 42 U.S.C. § 12101(a)(7)). *See also* Goodman et al., *supra* note 11, at 1 (“Many means-tested public benefits in the U.S. impose asset and income limits, but do not take the additional costs of disability into consideration.”).

<sup>93</sup> Goodman et al., *supra* note 13, at 1.

<sup>94</sup> *The Megan Parker Medicaid Payback Trust* (June 7, 2021) (on file with author).

the bar exam *must* be deposited into my Medicaid Payback Trust as part of the solution to maintain my Medicaid eligibility.<sup>95</sup>

#### IV. ANALYSIS

Medicaid and SSI's strict income and resource limits "allow recipients to keep only a meager amount of their earnings, other benefits, and savings, and prevent many needy elderly and disabled people from qualifying."<sup>96</sup> "Unrealistically low limits on assets and earnings make people fear losing vital public benefits if they work too many hours or earn too much."<sup>97</sup> As a result, Medicaid and SSI beneficiaries—especially individuals with disabilities—are being penalized for entering the workforce, earning income, and saving money.<sup>98</sup> This penalization directly conflicts with Congress' findings in the ADA:

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.<sup>99</sup>

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<sup>95</sup> Soc. Sec. Admin., *SI 01120.200 Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act*, PROGRAM OPERATIONS MANUAL SYS., (G)(1)(d) <https://secure.ssa.gov/poms.nsf/lnx/0501120200> [<https://perma.cc/SX2Z-BSCM>] [hereinafter *Information on Trusts*] (last updated June 7, 2018).

<sup>96</sup> Kathleen Romig & Sam Washington, *Policymakers Should Expand and Simplify Supplemental Security Income*, CTR. FOR BUDGET & POL'Y PRIORITIES, 1 (June 30, 2021), <https://www.cbpp.org/sites/default/files/6-30-21socsec.pdf> available at <https://www.cbpp.org/research/social-security/policymakers-should-expand-and-simplify-supplemental-security-income> [<https://perma.cc/R4MW-3H4H>].

<sup>97</sup> *Policy & Advocacy: Employment, Training, and Wages*, *supra* note 16.

<sup>98</sup> Romig & Washington, *supra* note 96, at 6 ("Low asset limits essentially penalize SSI recipients for saving. Since exceeding the limit can cause the loss of not just SSI cash benefits but also in some cases Medicaid, housing assistance, and other benefits, a prudent recipient will avoid saving too much.").

<sup>99</sup> Americans with Disabilities Act of 1990, § 2(a)(8)–(9) (codified as 42 U.S.C. § 12101(a)(7)–(8)) (listing two of Congress' findings in enacting the ADA).

Persons with permanent disabilities<sup>100</sup> should not be subject to an income or resource limit in determining and/or maintaining their Medicaid eligibility. Although there are proposed changes to SSI that would increase the income and resource limitations, thus changing Medicaid eligibility criteria in 1634 States,<sup>101</sup> these proposed changes do not entirely address nor fix the issue of individuals with disabilities maintaining their economic independency and health care coverage. Further, the current programs that are in place for income and/or resources over the eligibility limits either discriminatorily restrict the beneficiary's rights to their financials or indirectly impose new income and resource limitations.

#### *A. Multiple Definitions of "Disability" Result in Confusion*

Under the ADA, disability is defined as: "(A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ."<sup>102</sup> However, for purposes of both the Medicaid and Social Security programs, an individual is disabled "if he is unable to engage in any substantial gainful activity by reason of any medical determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."<sup>103</sup> Further, Ohio law states that an adult is disabled if they are "unable to do any substantial gainful activity by reason of any medical determinable physical or mental impairment or combination of impairments which can be expected to result in death or

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<sup>100</sup> See *infra* Part I ("a physical or mental impairment indefinitely impacting an individual's health and ability to perform certain tasks").

<sup>101</sup> Lorie Konish, *Supplemental Security Income benefits haven't changed in years. Now there's a push in Congress to alter that*, CNBC (Sept. 24, 2021, 8:05 AM), <https://www.cnbc.com/2021/09/24/how-congress-could-change-supplemental-security-income-benefits.html> [<https://perma.cc/9Q3T-8PC4>] (updated Sept. 24, 2021, 11:24 AM).

<sup>102</sup> Americans with Disabilities Act of 1990, § 3(2) (codified as 42 U.S.C. § 12102(1)). See 42 U.S.C. § 12102(2)–(3) (defining "major life activities" and "regarded as having such an impairment").

<sup>103</sup> 42 U.S.C. § 1383c(a)(3)(A).

which has lasted or can be expected to last for a continuous period of not less than twelve months.”<sup>104</sup>

Substantial gainful activity (“SGA”) is work activity that: (1) involves significant physical or mental activity and (2) is the kind of work typically done for pay or profit, regardless of if profit is made.<sup>105</sup> In 2021, the monthly SGA amount was \$2,190 for statutorily blind individuals and \$1,310 for non-blind individuals.<sup>106</sup> Both the blind individuals and non-blind individuals SGA amounts change with the national average wage index.<sup>107</sup>

Under 2021 Medicaid and SSI laws, this means the moment a non-blind individual with a “a physical or mental impairment that substantially limits one or more major life activities”<sup>108</sup> earns \$1,350 a month—just \$3,320 above the FPL,<sup>109</sup> they are no longer considered “disabled” for Medicaid and SSI determinations. How can one law conclude that an individual is disabled regardless of income while another concludes that an individual is no longer disabled once they earn a certain amount of income? Further, how does this *no longer disabled when you have money* standard impact individuals with disabilities attempting to apply for Medicaid Buy-In for Workers

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<sup>104</sup> OHIO ADMIN. CODE 5160:1-3-02(A)(3)(a) (2017). *See id.* at (A)(3)(b) (defining “disabled” for children). *See also* Soc. Sec. Admin., *Substantial Gainful Activity*, <https://www.ssa.gov/oact/cola/sga.html> [<https://perma.cc/M8E5-9W4G>] [hereinafter *2021 Substantial Gainful Activity*] (last visited Oct. 10, 2021).

<sup>105</sup> 20 C.F.R. § 404.1572 (2021).

<sup>106</sup> *2021 Substantial Gainful Activity*, *supra* note 104 (“The Social Security Act specifies a higher SGA amount for statutorily blind individuals; Federal regulations specify a lower SGA amount for non-blind individuals”).

<sup>107</sup> Soc. Sec. Admin., *Substantial Gainful Activity*, <https://www.ssa.gov/oact/cola/sga.html> [<https://perma.cc/6RTE-EJL7>] [hereinafter *2022 Substantial Gainful Activity*] (last visited Oct. 15, 2021) (“The monthly SGA amount for statutorily blind individuals for 2022 is \$2260. For non-blind individuals, the monthly SGA amount for 2022 is \$1350”).

<sup>108</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), § 3(2) (codified as 42 U.S.C. § 12102(1)).

<sup>109</sup>  $1,350 \times 12 = 16,200$ .  $16,200 - 12,880 = 3,320$ .

with Disabilities—which maintains that an “individual is considered disabled for the purpose of the supplemental security income program . . .”?<sup>110</sup>

*B. Proposed Updates to Social Security and Medicaid Laws are Not Enough*

Because Ohio is now a 1634 State and uses SSI eligibility criteria to determine Medicaid eligibility,<sup>111</sup> reforming Ohio Medicaid’s strict income and asset limits needs to begin (but not end) with updating the SSI program. “[D]ue to decades of shameful federal neglect, the program now consigns millions to deep and enduring poverty, when it should instead offer a lifeline out of it.”<sup>112</sup> On June 15, 2021, Senator Sherrod Brown (D-OH) re-introduced the Supplemental Social Security Income Restoration Act (“SSI Restoration Act”)<sup>113</sup> “to bring the [SSI] program into the 21<sup>st</sup> Century and ensure disabled and elderly Ohioans are able to live with dignity.”<sup>114</sup>

If passed in full, the SSI Restoration Act would (among other things) update several portions of the SSI program to account for inflation and increase the strict income and asset limits. Specifically, the SSI Restoration Act would:

Raise SSI’s sub-poverty-level monthly benefits, currently \$794 per month, to 100% of the federal poverty level . . . and index them to inflation;

Update and index the assets individuals or couples may have up to \$10,000 and \$20,000, respectively. The current limit of \$2,000 for an individual and \$3,000 for a couple has not been updated since 1989;

Update and index SSI’s income rules – which have never been updated since the program was signed into law in 1972. These reforms will allow individuals to earn

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<sup>110</sup> OHIO REV. CODE ANN. § 5163.093(B)(2)(a) (West 2013).

<sup>111</sup> Letter from John McCarthy to Medicaid Eligibility Manual Holders, *supra* note 66.

<sup>112</sup> Press Release, Sherrod Brown U.S. Sen. for Ohio, Brown Leads Senators in Introducing Historic Legislation to Update Long-Neglected Social Security Program to Ensure Older Adults & People with Disabilities are no Longer Trapped in Poverty (June 16, 2021) [hereinafter Press Release, Senators to Update Long-Neglected Social Security Program] <https://www.brown.senate.gov/newsroom/press/release/social-security-program-update> [<https://perma.cc/FL2C-9LQX>].

<sup>113</sup> Supplemental Social Security Restoration Act, S. 2065, 117th Cong. (2021) (introduced on June 15, 2021), <https://www.congress.gov/117/bills/s/2065/BILLS-117s2065is.pdf> available at <https://www.congress.gov/bill/117th-congress/senate-bill/2065/text> [<https://perma.cc/VX75-REBN>].

<sup>114</sup> Press Release, Senators to Update Long-Neglected Social Security Program, *supra* note 112.



up to \$399 a month from working, and up to \$123 a month in assistance from other sources . . . without being subject to a benefit reduction.<sup>115</sup>

Many of these reforms are a step in the right direction toward “the Nation's proper goals regarding individuals with disabilities,” which are: “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . .”<sup>116</sup> These reforms, however, still place disabled Medicaid and SSI beneficiaries at a significant disadvantage compared to their non-disabled counterparts.

Under the SSI Restoration Act, an SSI beneficiary is allowed to earn \$4,788 a year before being subject to benefit reductions or termination,<sup>117</sup> whereas current rules permit the SSA to disregard “the first \$20 of most income received in a month [and] the first \$65 of earnings and one-half of earnings over \$65 received in a month” before implementing benefit reductions or termination.<sup>118</sup> This income, in addition to the proposed new monthly SSI benefit rate being raised to 100% instead of merely 65% of the FPL,<sup>119</sup> would mean an SSI beneficiary sits just \$4,788 above the 2021 FPL before taxes are taken out of their income, whereas a non-beneficiary earning the average per capita income in Ohio<sup>120</sup> sits \$18,672 above the 2021 FPL before taxes.

### *C. Medicaid Buy-In for Workers with Disabilities Leaves Questions Unanswered*

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<sup>115</sup> *Id.* (listing the changes the SSI Restoration Act would lead to if implemented).

<sup>116</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (§ 2(a)(8) codified as 42 U.S.C. § 12101(a)(7)).

<sup>117</sup> Press Release, Senators to Update Long-Neglected Social Security Program, *supra* note 112 (“These reforms will allow individuals to earn up to \$399 a month from working, and up to \$123 a month in assistance from other sources . . . payments without being subject to a benefit reduction.”).

<sup>118</sup> UNDERSTANDING SSI BENEFITS, *supra* note 27.

<sup>119</sup> Press Release, Senators to Update Long-Neglected Social Security Program, *supra* note 112 (“Raise SSI's sub-poverty-level monthly benefits, currently \$794 per month, to 100% of the federal poverty level--a 31% increase--and index them to inflation”).

<sup>120</sup> U.S. Census Bureau, *QuickFacts Ohio*, CENSUS.GOV, <https://www.census.gov/quickfacts/fact/table/OH/INC110219> [<https://perma.cc/4HXXH-L5JX>] (last visited Jan. 23, 2022) (choose “Income & Poverty” from the dropdown).

Under Medicaid Buy-In for Workers with Disabilities (“MBIWD”), Ohioans with disabilities can participate in part-time or full-time work and earn income up to a certain amount without losing their health care coverage.<sup>121</sup> To qualify for MBIWD, an applicant must provide “satisfactory evidence” that they are between the age of 16 and 64 and that one of the following applies:

- (a) The individual is considered disabled for the purpose of the supplemental security income program, regardless of whether the individual receives supplemental security benefits, and the individual has earnings from employment.
- (b) The individual is an employed individual with a medically improved disability.<sup>122</sup>

Further, the individual must meet various financial requirements, including a monthly income less than or equal to 250% of the FPL (\$32,200)<sup>123</sup> and comply with annual resource eligibility limits.<sup>124</sup> Lastly, an individual may be required to pay a premium based on their income and standard deductions.<sup>125</sup>

To determine whether an individual meets the income eligibility requirement, Ohio Medicaid first applies general Medicaid income exclusions to disregard certain forms of income.<sup>126</sup>

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<sup>121</sup> Ohio Dep’t of Medicaid, *Medicaid Buy-In for Workers with Disabilities*, MEDICAID.OHIO.GOV, <https://medicaid.ohio.gov/wps/portal/gov/medicaid/families-and-individuals/citizen-programs-and-initiatives/medicaid-buy-in-for-workers-with-disabilities> [<https://perma.cc/WHZ2-KTYT>] [hereinafter *Ohio MBIWD*] (last visited Oct. 20, 2021).

<sup>122</sup> OHIO. REV. CODE. ANN. § 163.091(B)(2)(a)–(b) (West 2013).

<sup>123</sup> *Id.* at (B)(3)–(4).  $12,880 \times 250\% = \$32,200$ . See Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. at 7733; 2021 Federal Poverty Level Standards, *supra* note 61.

<sup>124</sup> *Ohio MBIWD*, *supra* note 121.

<sup>125</sup> OHIO. REV. CODE. ANN. § 163.091(C) (West 2013); see also Disability Rights Ohio, *Employment: Medicaid Buy-In for Workers with Disabilities (MBIWD)*, DISABILITYRIGHTSOHIO.ORG, <https://www.disabilityrightsohio.org/employment-medicare-buy-in-workers-disabilities> [<https://perma.cc/555D-VL6X>] (last updated Jan. 2021) (“Monthly premiums are required for those eligible for MBIWD with an annual income greater than 150% FPL . . . . Premiums are determined through a set of calculations based on income, family size, and certain standard deductions . . .”).

<sup>126</sup> OHIO REV. CODE ANN. § 163.093(C) (West 2013) (“Any other amounts, if any, specified in rules authorized by section 5163.098 of the revised code shall be disregarded from the individual’s earned income, unearned income, or both.”); OHIO ADMIN. CODE 5160:1-5-03(D)(1)(a) (2020) (“From the individual’s income, apply exclusions in

After the general Medicaid exclusions are applied, if the individual's income is still over 250% of the FPL, Ohio Medicaid will apply an additional \$20,000 earned income exclusion—which can be applied wholly or partially in any month.<sup>127</sup> “This exclusion begins the first month the individual would otherwise be eligible for MBIWD except for their income and continues within a twelve-month period until the twenty thousand dollars is exhausted.”<sup>128</sup> However, an individual's income is not the only eligibility requirement for MBIWD. Additionally, an individual's resources “shall not exceed ten thousand dollars” or they will be ineligible for MBIWD.<sup>129</sup> Similar to how income is calculated, Ohio Medicaid will apply general Medicaid resource exclusions to disregard certain forms of resources.<sup>130</sup>

If after all the income exclusions are applied an individual's income is over 150% of the FPL (\$19,320) but under 250% of the FPL (\$32,200), an individual will be required to pay a monthly premium to maintain their Medicaid.<sup>131</sup> For example, if an individual with disabilities earns the same amount as the Ohio median household income in 2019 (\$56,602),<sup>132</sup> this individual is ineligible for MBIWD because their countable income is too high.

MBIWD leaves individuals with too many unanswered questions in attempting to determine their eligibility and monthly premiums and does not fully consider “the true level of

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accordance with rule 5160:1-3-03.2 of the Administrative Code.”); *id.* at 5160:1-3-03.2 (2021) (detailing the Medicaid income exclusions).

<sup>127</sup> OHIO ADMIN. CODE 5160:1-3-03(D)(1)(c).

<sup>128</sup> *Id.* at (c)(ii).

<sup>129</sup> OHIO REV. CODE ANN. 5163.092(a) (West 2013).

<sup>130</sup> OHIO ADMIN. CODE 5160:1-3-05.14 (2021) (detailing the Medicaid resource exclusions).

<sup>131</sup> *Id.* at 5160:1-5-03(E) (“An individual eligible for MBIWD whose income exceeds one hundred fifty per cent of the FPL for one person must pay a premium . . .”).

<sup>132</sup> U.S. Census Bureau, *supra* note 120.

economic hardship experienced by households that include a person with a disability.”<sup>133</sup> First, if eligibility is determined based on an individual’s *countable* income and resources, why is the individual’s premium determined based on their gross annual income instead of their countable income?<sup>134</sup> Second, why are individuals with disabilities ineligible for MBIWD if they are employed and their countable income is greater than 250% of the FPL—especially when most, if not all, disabilities do not disappear once countable income is greater than the limit? Lastly, does MBIWD cover *all* the same costs as regular Medicaid?

#### *D. (ST)ABLE Accounts Inadvertently Impose Income and Resource Limits*

Created by the Achieving a Better Life Experience Act (“ABLE”),<sup>135</sup> special investment accounts are available as a way for individuals with disabilities to save and grow their resources without losing eligibility for public benefit programs, such as Medicaid and SSI.<sup>136</sup> On June 1, 2016, Ohio became the first state to enact a State ABLE (“(ST)ABLE”) account program.<sup>137</sup> For the SSI program specifically, (ST)ABLE accounts can contain up to \$100,000, and such resources will not be counted toward eligibility.<sup>138</sup>

There may be several benefits to (ST)ABLE accounts for eligible persons with disabilities, including: (1) having the ability to save and invest money without losing eligibility for Medicaid

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<sup>133</sup> Goodman et al., *supra* note 13, at 1 (“a household containing an adult with a disability that limits their ability to work requires, on average, **28 percent more income (or an additional \$17,690 a year)** to obtain the same standard of living as a similar household without a member with a disability.”) (emphasis in original).

<sup>134</sup> See OHIO ADMIN. CODE 5160:1-5-03(E)(1) (“From the gross annual family income at the time of application and subsequent renewals for MBIWD . . .”).

<sup>135</sup> Achieving a Better Life Experience (ABLE) of 2014, H.R.6477, 113th Cong. (2015) (enacted).

<sup>136</sup> *About STABLE Accounts*, <https://www.stableaccount.com/about-stable/> [<https://perma.cc/L9F5-S52N>] (last visited Oct. 20, 2021).

<sup>137</sup> Nancy Susan Germany, *Disability, Poverty, and the Policy Behind the Able Act*, 14 NAELA J. 81, 82 (2018).

<sup>138</sup> Soc. Sec. Admin., *SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts*, PROGRAM OPERATIONS MANUAL SYS., (C)(3) <https://secure.ssa.gov/poms.nsf/lnx/0501130740> [<https://perma.cc/4FXM-VJG3>] [hereinafter *ABLE Accounts*] (last updated Mar. 13, 2020).

and SSI based on exceeding resource limitations and (2) receiving federal income tax exemptions for earnings in these accounts—so long as the money is spent on qualified disability expenses.<sup>139</sup> Although many believe (ST)ABLE accounts are the better option when compared to the various Medicaid Payback Trusts,<sup>140</sup> these accounts also come with several burdensome guidelines and stipulations which may prevent a person from being able to enjoy these benefits. The benefits and barriers of (ST)ABLE accounts stem from the fact that (ST)ABLE accounts are modeled after Section 529 qualified tuition plans (“Section 529 plans”).<sup>141</sup>

First, just as funds from Section 529 plans can only be used for “qualified higher education expenses” in connection with enrollment or attendance at educational institutions,<sup>142</sup> funds within (ST)ABLE accounts can only be used for “qualified disability expenses” to maintain the benefits of the account.<sup>143</sup> Qualified disability expenses are those “*related to the eligible individual’s*

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<sup>139</sup> *About STABLE Accounts*, *supra* note 136 (“STABLE Accounts allow individuals with disabilities to save and invest money without losing eligibility for certain public benefits programs, like Medicaid, SSI, or SSDI. Earnings in your STABLE Account are not subject to federal income tax, so long as you spend them on ‘Qualified Disability Expenses.’”).

<sup>140</sup> Sept. 23 E-mail from Lindsay C. Jones, *supra* note 19 (“ . . . STABLE accounts are actually more flexible when compared to other ‘special needs trusts,’ since the SSA and Medicaid will permit STABLE funds to be used for food and shelter so long as it can be reasonably linked to the disability”). *See also* R. F. Meyer & Associates, *Navigating ABLE or STABLE Accounts*, (June 28, 2016) <https://www.elderlaw.us/navigating-able-stable-accounts/> [<https://perma.cc/BN9S-HC7V>]. *Compare with* Thomas D. Begley, Jr., *Advantages and Disadvantages of ABLE Accounts*, BEGLEY LAW GROUP, <https://www.begleylawgroup.com/2021/12/advantages-and-disadvantages-of-able-accounts/> [<https://perma.cc/2Y9P-9D2M>] (last visited Dec. 10, 2021) (“A Third Party Special Needs Trust is much more flexible with respect to distributions”).

<sup>141</sup> *See* I.R.C. § 529. *See also* Begley, *supra* note 140 (“The Act is modeled on 529 Plans and will provide tax-favored accounts for individuals with disabilities to pay for qualified expenses.”); Acad. of Special Needs Planners, *Stetson 2020: The Good, the Bad and the Unknown of Using ABLE Accounts*, [https://attorney.elderlawanswers.com/stetson-2020-the-good-the-bad-and-the-unknown-of-using-able-accounts-18018?utm\\_source=twitter&utm\\_medium=tweet&utm\\_campaign=ASNP%20Article](https://attorney.elderlawanswers.com/stetson-2020-the-good-the-bad-and-the-unknown-of-using-able-accounts-18018?utm_source=twitter&utm_medium=tweet&utm_campaign=ASNP%20Article) [<https://perma.cc/7ABJ-UQC2>] (last visited Dec. 10, 2021).

<sup>142</sup> I.R.C. § 529(b)(1)(A). *See also* SEC, *An Introduction to 529 Plans*, <https://www.sec.gov/reportspubs/investor-publications/investorpubsintro529htm.html> [<https://perma.cc/2GQJ-TQFZ>] (last updated May 29, 2018) (“With limited exceptions, you can only withdraw money that you invest in [a Section 529 plan] for qualified higher education expenses or tuition for elementary or secondary schools without incurring taxes and penalties”),

<sup>143</sup> Achieving a Better Life Experience (ABLE) Act of 2014, Pub. L. No. 113-295, 128 Stat. 4056 (2014), § 529A (codified as I.R.C. § 529A(b)(1)(A)) (“for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account”). *See also* Begley, *supra* note 140 (“The use of the funds is limited to qualified disability expenses”).

*blindness or disability* which are made *for the benefit* of an eligible individual who is the designated beneficiary . . . .”<sup>144</sup> These expenses include (but are not limited to) education, housing, transportation, health, legal fees, and more.<sup>145</sup>

However, if an expense is not “related to the eligible individual’s blindness or disability[,]”<sup>146</sup> such as if an eligible person with disabilities wanted to exercise their Second Amendment right to purchase and own a firearm<sup>147</sup> or partake in reasonable gambling, the expense will be considered a non-qualified expense. When the eligible person with disabilities uses their (ST)ABLE account funds on non-qualified expenses, they “will have to pay regular income taxes, plus a 10% additional tax, on the earnings portion of those non-qualified funds.”<sup>148</sup> Further, the non-qualified funds “could be counted against [the eligible person with disabilities] for purposes of determining [their] eligibility for means-tested public benefits programs, like Medicaid or SSI.”<sup>149</sup> With (ST)ABLE accounts, the fear of losing Medicaid or SSI continues as the eligible person with disabilities must make sure they are not spending their own money on non-qualified expenses.

Second, (ST)ABLE accounts are subject to an annual contribution limit, consisting of the 2021 standard contribution limit of \$15,000—equal to the annual gift tax exclusion maximum for

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<sup>144</sup> I.R.C. § 529A(e)(5) (emphasis added).

<sup>145</sup> *ABLE Accounts*, *supra* note 138, at (B)(8) (listing categories of expenses considered qualified disability expenses).

<sup>146</sup> I.R.C. § 529A(e)(5).

<sup>147</sup> U.S. CONST. amend. II. (“ . . . the right of the people to keep and bear Arms, shall not be infringed”).

<sup>148</sup> *Qualified Expenses*, <https://www.stableaccount.com/qualified-expenses/> [<https://perma.cc/F582-VWM6>] (last visited Dec. 10, 2021). *See also* I.R.C. 529A(c)(1)(B)(i) (explaining funds used for qualified disability expenses are not subject to federal income taxes); *id.* at (c)(3)(A) (explaining funds not used for qualified disability expenses are subject to federal income taxes and a 10% penalty). *Compare with An Introduction to 529 Plans*, *supra* note 142 (“However, if [Section 529 plan funds] are not used for qualified higher education expenses . . . , they will be subject to state and federal income taxes and an additional 10% federal tax penalty on earnings”).

<sup>149</sup> *Qualified Expenses*, *supra* note 148.

individual contributions to Section 529 plans<sup>150</sup>— and the 2021 earned income limit of \$12,760, totaling a yearly contribution limit of \$27,760.<sup>151</sup> Although these contribution limits are increasing in 2022 to a standard limit of \$16,000 and an earned income limit of \$12,880,<sup>152</sup> an eligible person with disabilities is only able to contribute a yearly total of \$28,880 to their (ST)ABLE account. “[T]his ceiling does not even cover the average extra expenditures, much less the extraordinary extra costs faced by some.”<sup>153</sup> Compared with the 2019 average household income (\$56,602),<sup>154</sup> an eligible person with disabilities making the average household income can only attribute roughly 51% of their yearly income to their (ST)ABLE account. The remaining 49% of the person’s income will either need to be placed into one of the various Medicaid Payback Trusts available—each with their own limitations and restrictions— or be counted as a resource against Medicaid and SSI eligibility.

Lastly, for an individual to be eligible for a (ST)ABLE account, their disability must have occurred prior to the individual reaching 26 years of age.<sup>155</sup> However, the extra costs associated with having a disability occur over the course of an individual’s life—regardless of when the disability began.<sup>156</sup> By limiting eligibility for a (ST)ABLE account to when an individual’s

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<sup>150</sup> Kathryn Flynn, *How much can you contribute to a 529 plan in 2021?* (Feb. 25, 2021), <https://www.savingforcollege.com/article/how-much-can-you-contribute-to-a-529-plan> [<https://perma.cc/N55K-QGF7>] (“In 2021, gifts totaling up to \$15,000 per individual will qualify for the annual gift tax exclusion . . .”).

<sup>151</sup> See *Saving & Investing*, <https://www.stableaccount.com/investments/> [<https://perma.cc/99ME-Y429>] (last visited Dec. 10, 2021).

<sup>152</sup> Begley, *supra* note 140 (“For 2022, contributions are limited to \$16,000 aggregate from all contributors in any one year . . . the maximum earned income contribution to an ABLE account by a disabled beneficiary is now \$12,880 per year.”).

<sup>153</sup> Goodman et al., *supra* note 13, at 10.

<sup>154</sup> U.S. Census Bureau, *supra* note 120.

<sup>155</sup> See I.R.C. § 529A(e)(1)(A) (“such blindness or disability occurred before the date on which the individual attained age 26 . . .”); Begley, *supra* note 140 (“he disability must have occurred prior to the beneficiary attaining age 26.”).

<sup>156</sup> Goodman et al., *supra* note 13, at 10 (“This research also highlights that extra expenditures occur over the course of an individual’s life, regardless of when the disability began.”).

disability begins, the goal of providing individuals with disabilities a method to save money for medical expenses is completely circumvented:

If the goal of the ABLE Act is to provide individuals and families with a mechanism to save for these expenditures, Congress should [disregard or get rid of] the eligibility requirement that an individual must have a qualifying impairment that began before the individual turned 26 in order to open an account.<sup>157</sup>

*E. SNTs and QITs Unfairly Restrict One's Rights to Their Money and Resources*

Special trusts are another option currently available to individuals with disabilities for maintaining Medicaid and SSI when they earn too much income or have too many assets or resources. One such trust, known as Miller Trusts—named after the landmark federal case<sup>158</sup> that created them at the common law<sup>159</sup>—is qualified income trusts (“QITs”), which were later statutorily authorized by the Omnibus Budget Reconciliation Act of 1993 (“OBRA ‘93”).<sup>160</sup> QITs are most often used “for a beneficiary needing long-term care in a skilled nursing home facility when his or her income exceeds the limits allowed by Medicaid but is insufficient to provide for his or her care.”<sup>161</sup> QITs are only used in 1634 States for Medicaid and Medicare programs

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<sup>157</sup> *Id.* (“This important change would expand access for individuals with disabilities and improve the overall sustainability of ABLE programs by increasing the number of accounts.”).

<sup>158</sup> *Miller v. Ibarra*, 746 F. Supp. 19 (D. Colo. 1990).

<sup>159</sup> Ira Stewart Wiesner, *Obra '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 19 NOVA L. REV. 679, 724 n. 172 (1995) (“The Committee Report accompanying the Senate Bill described the second of two trusts exempted from its proposed treatment of trust as a trust known as ‘Miller Trusts’ as a result of its similarity to the trusts being employed in Colorado and other states following the *Miller* [*v. Ibarra*] decision”)..

<sup>160</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

<sup>161</sup> Melanie Bradford Holliman, *Special Needs Trusts: What You Need to Know to Help Your Clients and Avoid Client Complaints*, 80 ALA. LAW. 343, 347 (2019).



following the special income level (SIL)<sup>162</sup> because 209(b) States<sup>163</sup> provide individuals with disabilities the ability to “spenddown” their income in excess of the Medicaid income limits.<sup>164</sup>

Under federal law, QIT’s established in a State for the benefit of an individual will not be subject to applicable OBRA ‘93<sup>165</sup> treatments of trusts under the following circumstances:

(i) the trust is composed of *only* pension, Social Security, and other *income* to the individual (and accumulated income in the trust),

(ii) the State will receive *all amounts remaining in the trust upon the death of such individual* up to an amount *equal to the total Medicaid assistance paid on behalf of the individual* under a State plan under this subchapter, and

(iii) the State makes medical assistance available to individuals described in section 1396(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C).<sup>166</sup>

In Ohio, a QIT is “a trust that allows an individual whose income is over the special income level (SIL) . . . to have some or all of his or her income not be counted when determining Medicaid eligibility by placing income in the trust.”<sup>167</sup> Specifically, QITs are only valid in Ohio if they meet *all* of the following requirements:

(i) The trust must be irrevocable.

(ii) Only the individual’s income can be placed into the QIT.

(iii) The source(s) of income placed into the QIT must be identified.

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<sup>162</sup> OHIO ADMIN. CODE 5160:1-6-03.1(B) (2021) (“equal to three hundred percent of the current supplemental security income (SSI) benefit payment rate for an individual.”).

<sup>163</sup> *Medicaid and the SSI Program*, *supra* note 65 (describing the States that use more restrictive criteria to determine Medicaid eligibility).

<sup>164</sup> *Id.* (“Spenddown applies to individuals who have too much income to qualify under the State’s income limits.”) *see also* Oct. 1 Interview with David Banas, *supra* note 10.

<sup>165</sup> Omnibus Budget Reconciliation Act of 1993, § 13611 (codified as amended at 42 U.S.C. § 1396p(d)) (amending Social Security Act § 1917(d)).

<sup>166</sup> 42 U.S.C. § 1396p(d)(4)(B)(i)-(iii) (emphasis added).

<sup>167</sup> OHIO ADMIN. CODE 5160:1-6-03.2(B)(6) (2021).

(iv) The individual cannot transfer or assign to the trust his or her right to receive income.

(v) No other property or resources, except for any interest earned on the trust corpus, can be placed into the QIT.

(vi) The trust document must provide that the trust shall terminate upon the death of the primary beneficiary, at which point the remaining trust property shall be distributed to the Ohio department of [M]edicaid or its successor up to an amount equal to the total medical assistance paid on behalf of the primary beneficiary; the trustee is prohibited from repaying other persons or creditors prior to this distribution.<sup>168</sup>

However, unlike federal law’s minimal requirements for QITs, Ohio requires any distributions from a QIT “be in amounts and for the purposes necessary to maintain the individual’s income eligibility for [M]edicaid.”<sup>169</sup>

Like QITs, Medicaid Payback or special needs trusts (“SNTs”) allow an individual to indirectly have resources above the Medicaid and SSI resource limits without losing their eligibility for such programs.<sup>170</sup> These trusts contain:

the *assets* of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.<sup>171</sup>

However, unlike QITs, SNTs, on their own, only allow Medicaid to disregard the *assets* an individual has saved.<sup>172</sup> Meanwhile, if an individual irrevocably assigns their income—subject to

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<sup>168</sup> *Id.* at (D)(1)-(6).

<sup>169</sup> *Id.* at (E).

<sup>170</sup> Hollman, *supra* note 161, at 344 (“allows [SNTs] to hold assets transferred by persons with disabilities . . . or by third parties so that (1) the transfer of the assets . . . and (2) the use of the assets . . . does not cause [the person] to lose means-tested government benefits”).

<sup>171</sup> 42 U.S.C. § 1396p(d)(4)(A) (emphasis added).

<sup>172</sup> *Id.* (emphasis added); Virtual Interview with David Banas, *supra* note 5.

limitations—to an SNT, the income will not be counted against the individual’s Medicaid eligibility.<sup>173</sup>

1. Revocation of One’s Right to Manage their Income and Resources.

While neither federal law nor Ohio law explicitly require the beneficiary and trustee of SNTs and QITs to be different persons,<sup>174</sup> the beneficiary with disabilities is never allowed to be the trustee of their SNT or QIT.<sup>175</sup> “The purpose of this prohibition is to avoid giving the beneficiary control over trust assets.”<sup>176</sup> Once an individual with disabilities establishes and funds their SNT or QIT, the trustee has total control over their finances involving funds from the trust, meaning the individual with disabilities has given up their right to choose how their money is spent.<sup>177</sup>

Additionally, although federal law does not impose a requirement that a SNT be irrevocable, the SSA requires that the trust must be irrevocable, “reasoning . . . that if the trust is revocable, the payback provision can be negated which automatically disqualifies the trust under

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<sup>173</sup> Oct. 1 Interview with David Banas, *supra* note 10 (“An individual can irrevocably assign their income to a (d)(4)(A) trust or a (d)(4)(C) trust . . . that essentially takes the income off of the individual and directly into the trust . . . that’s passed muster in Ohio for many years.”).

<sup>174</sup> See e.g. OHIO ADMIN. CODE 5160:1-3-05.2 (B)(1) (2018) (““Beneficiary” means any person benefiting in some way from the trust. The beneficiary can be the grantor or another person. There may be more than one beneficiary of a trust.”); *Id.* at (B)(11) (““Trustee” means any person who manages a trust. A trustee manages a trust’s principal and income for the benefit of the beneficiaries.”).

<sup>175</sup> Am. Council on Aging, *How Qualified Income Trusts (Miller Trusts) Help Medicaid Applicants Become Eligible for Long-Term Care*, MEDICAIDPLANNINGASSISTANCE.ORG, <https://www.medicaidplanningassistance.org/miller-trusts/> [<https://perma.cc/JE3K-KTB9>] [hereinafter *How QITs Help Medicaid Applicants Become Eligible for LTC*] (last updated Dec. 23, 2021) (“This person must be someone other than the Medicaid applicant, but can be a relative, such as an adult child.”); see also Hollman, *supra* note 161, at 346 (“A corporate trustee, family member or friend may be the trustee.”).

<sup>176</sup> Hollman, *supra* note 161, at 346.

<sup>177</sup> Brady Cobin L. Grp., PLLC, *Medicaid Asset Protection Trust Planning to Qualify for Medicaid Benefits in NC*, NCESTATEPLANNING.COM, <https://ncestateplanning.com/medicaid-asset-protection-trust-planning/> [<https://perma.cc/J8SH-MJSV>] (Sept. 7, 2021) (“Once you create and fund an irrevocable trust, your trustee has control over your assets. They are to control them for your benefit, but you’ve given up the right to say how that’s done.”) (emphasis omitted).

42 U.S.C. § 1396p(d)(4)(A).”<sup>178</sup> Ohio similarly imposed the requirement that QITs must be irrevocable in order to be valid.<sup>179</sup>

This means once an individual with disabilities establishes and funds their SNT or QIT, the individual completely loses the ability to make decisions on how their hard-earned money is spent for the rest of their life. This aspect of SNTs and QITs directly conflicts with Congress’ explicitly stated goals of the United States, which is to assure that individuals with disabilities have “*equality of opportunity, full participation, independent living, and economic self-sufficiency . . .*.”<sup>180</sup> In my case particularly, this means I have no direct access to or control over the income I earned during my first job during law school—nor subsequent employment after law school if I wish to maintain Medicaid eligibility—while my non-disabled fellow law students are able to directly access and control their earned income.

## 2. Requirement of Payment to State Medicaid Plans upon Beneficiary’s Death.

For both SNTs and QITs, the federal law imposes the requirement that, upon the death of the beneficiary with disabilities, any funds left in the trusts must first be used to reimburse the State for medical assistance services through Medicaid from the beneficiary’s entire life.<sup>181</sup> The SSA explains that the “State(s) must be listed as the first payee(s) and have priority over payment

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<sup>178</sup> Hollman, *supra* note 161, at 346 (“Additionally, if the trust can be revoked by the beneficiary, the assets in trust will be deemed as being available to him or her . . . [and] considered in determining the beneficiary’s eligibility for benefits.”).

<sup>179</sup> OHIO ADMIN. CODE 5160:1-6-03.2(D)(1) (2021).

<sup>180</sup> Americans with Disabilities Act of 1990, § 2(a)(8) (codified as 42 U.S.C. § 12101(a)(7)) (emphasis added).

<sup>181</sup> *See* 42 U.S.C. § 1396p(d)(4)(A), (B)(ii); *see also* Soc. Sec. Admin., *SI 01120.203 Exceptions to Counting Trusts Established on or after January 1, 2000*, PROGRAM OPERATIONS MANUAL SYS., (B)(10) <https://secure.ssa.gov/poms.nsf/lnx/0501120203> [<https://perma.cc/HY5W-TF3B>] [hereinafter *Exceptions to Counting Trusts*] (last updated Nov. 9, 2021) (“The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s) . . . [or] any particular period of time . . .”).

of other debts and administrative expenses” in order for the trust to fully qualify under the special needs trust exception.<sup>182</sup>

Although the SSA outlines a small remedy in the scenario where a trust has inadequate funds to fully reimburse the State for all medical assistance over the course of the beneficiary’s life, the language used by the SSA implies that this remedy is only available when multiple States provided medical assistance to an individual with disabilities.<sup>183</sup> What happens to an individual with disabilities who has received medical assistance since birth from only one State—like me—when they do not have sufficient funds in the trust upon their death to reimburse the one State? Are family members of the individual with disabilities subsequently required to pay back the remaining amount owed to the State, like how other debts are transferred to surviving kin? As the law stands right now, these are just a few of the many questions individuals with disabilities have that are left unanswered.

### 3. QITS and SNTs Unduly Restrict Expenses Allowed Using the Trust’s Funds.

Although federal law, when read alone, allows for a broad interpretation of what SNTs and QITs can be used for, how they can be established, and what the funds within the trust can be used for, the SSA and Ohio have limited the scope of these requirements though subsequent interpretations and regulations. First, although federal law does not specify any requirements that assets from SNTs be used only for the sole benefit of the beneficiary with disabilities, the SSA has interpreted the statute to create such requirement.<sup>184</sup> On a similar note, because SNTs are “designed

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<sup>182</sup> *Exceptions to Counting Trusts*, *supra* note 181 (“The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s).”).

<sup>183</sup> *Id.* (“If the trust does not have sufficient funds upon the beneficiary’s death to reimburse in full each State that provided medical assistance, the trust may reimburse States on a pro-rata or proportional basis.”).

<sup>184</sup> Soc. Sec. Admin., *SI 01120.201 Trusts Established with the Assets of an Individual on or after 01/01/00*, PROGRAM OPERATIONS MANUAL SYS., (F)(1) <https://secure.ssa.gov/poms.nsf/lnx/0501120201> [<https://perma.cc/C4BB-JQBM>] [hereinafter *Trusts Established with the Assets of an Individual*] (last updated Apr. 30, 2018)

to supplement the beneficiary’s needs for items that are not covered by governmental programs[.]” funds from the trust cannot be used for health, maintenance, education, and support costs.<sup>185</sup> Ohio has imposed similar restrictions upon how funds in QITs can be used.<sup>186</sup>

Because most, if not all, of an individual’s income must be deposited into these trusts to maintain their Medicaid eligibility, the restrictions on what the funds in the trust can be used for impede “the Nation’s proper goals regarding individuals with disabilities [assuring] equality of opportunity, full participation, independent living, and economic self-sufficiency . . . .”<sup>187</sup> Hypothetically, an individual with disabilities would not be able to purchase a firearm using funds from a SNT or QIT. Doesn’t this restriction infringe on the individual’s constitutional right to bear arms?<sup>188</sup> While this hypothetical situation has not reached the judicial system yet, deciding whether an individual’s constitutional right is being infringed should be an indication that the rule is morally and socially wrong.

## V. CONCLUSION

Despite society’s 50 years of progress toward recognizing the rights of persons with disabilities and ensuring equality, certain language and implementation of laws still reflect outdated and discriminatory views against persons with disabilities.<sup>189</sup> Adults with disabilities are twice as likely to have income under the poverty threshold due to a lesser likelihood of being

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(“Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual’s life.”).

<sup>185</sup>Hollman, *supra* note 161, 346.

<sup>186</sup> OHIO ADMIN. CODE 5160:1-6-03.2(E) (2021).

<sup>187</sup> 42 U.S.C. § 12101(a)(7).

<sup>188</sup> *See* U.S. CONST. amend. II (“the right of the people to keep and bear Arms, shall not be infringed.”).

<sup>189</sup> *Introduction to the ADA*, *supra* note 4 (“Modeled after the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin – and Section 504 of the Rehabilitation Act of 1973 -- the ADA is an ‘equal opportunity’ law for people with disabilities.”); Oct. 1 Interview with David Banas, *supra* note 10; *see also e.g., Mathews v. Eldridge*, 424 U.S. 319, 342 (1976) (“Still, the *disabled worker's need* is likely to be *less* than that of a welfare recipient”) (emphasis added).

employed and having lower wages on average than their non-disabled counterparts.<sup>190</sup> Researchers believe “a household containing an adult with a disability that limits their ability to work requires, on average, 28 percent more income (or an additional \$17,690 a year) to obtain the same standard of living as a similar household without a member with a disability.”<sup>191</sup> Looking at an individual’s income without looking at their life circumstances leads to “many people with disabilities [being] viewed as financially able and thus denied assistance even though the reality of their extra disability-related expenditures places them in a tenuous financial position.”<sup>192</sup> Because of Medicaid’s low limits on assets and earnings for eligibility, persons with disabilities must choose between maintaining their life-sustaining health insurance or having an opportunity of full participation, independent living, and economic self-sufficiency.<sup>193</sup>

Adding on, despite current legislative efforts aimed at fixing the disparities between persons with disabilities and persons without,<sup>194</sup> these reforms still place disabled Medicaid and SSI beneficiaries at a significant disadvantage compared to their non-disabled counterparts. Further, the current programs in place for persons with disabilities whose income is greater than the limits imposed by Medicaid unduly restrict the individual’s right to spend their money and require individuals to reimburse States for medical assistance provided—which is something

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<sup>190</sup> Goodman et al., *supra* note 13 (“Working-age adults with disabilities are twice as likely as those without disabilities to have incomes under the poverty threshold. They are less likely to be employed than their peers without disabilities and, even among those who are employed, they have lower wages on average than those without disabilities.”).

<sup>191</sup> *Id.* at 1 (listing researchers from Stony Brook University, the University of Tennessee, National Disability Institute, and the Oxford Institute of Population Ageing) (emphasis omitted).

<sup>192</sup> Goodman et al., *supra* note 13, at 1.

<sup>193</sup> *Policy & Advocacy: Employment, Training, and Wages*, *supra* note 16 (“Unrealistically low limits on assets and earnings make people fear losing vital public benefits if they work too many hours or earn too much.”).

<sup>194</sup> Press Release, Sherrod Brown U.S. Sen. for Ohio, Brown Leads Senators in Introducing Historic Legislation to Update Long-Neglected Social Security Program to Ensure Older Adults & People with Disabilities are no Longer Trapped in Poverty (June 16, 2021) <https://www.brown.senate.gov/newsroom/press/release/social-security-program-update> [<https://perma.cc/FL2C-9LQX>].

already jointly funded by the federal government.<sup>195</sup> Should States be allowed to receive compensation twice for providing the necessary medical assistance to individuals with disabilities who would not be able to survive without the services paid for by such medical assistance?

This is the 21<sup>st</sup> century: Ohio and the rest of the United States can do better than subjecting individuals with disabilities to outdated, archaic, and stereotypical treatment by threatening to take away their necessary medical insurance, thus implying that they are incapable of contributing meaningfully to society. One way Ohio and the rest of the United States can fix this unnecessary discrimination is to have Medicaid and Medicare include income and asset exemptions for working individuals with chronic or uncurable disabilities to distinguish between short term and permanent disabilities. More than legislative updates to the Social Security laws accounting for inflation need to be made. Legislation recognizing the increased opportunities for individuals with disabilities to work remotely or with better accommodations needs to be enacted and factored into the current Medicaid and Medicare programs. Lastly, restrictions and limitations on ways the funds in QITs and SNTs can be used should be removed to provide individuals with disabilities the same economic and financial freedoms their non-disabled counterparts enjoy.

To reach my life-long dream of increasing the number of U.S. attorneys with disabilities, despite the ever-increasing obstacles coming up along the way, I bit my tongue and played the government's game by opening a Medicaid Payback Trust to receive the income from my summer job as a 1L and 2L. But I didn't just go to law school to become a U.S. attorney with disabilities: I went to law school to promote change and increase equity for all individuals with disabilities. Therefore, I won't stop advocating until the world stops subjecting individuals with disabilities to outdated, archaic, and stereotypical treatment.

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<sup>195</sup> Provost & Hughes, *supra* note 22.