QUEUE & ADA: *A.L. V. WALT DISNEY PARKS & RESORTS* AND HOW THE FEAR OF FRAUD MAY FUNDAMENTALLY ALTER THE ADA

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I. INTRODUCTION

On May 14, 2013, *HuffPost*[1] published "Disney World Scam: Wealthy Moms 'Rent' Disabled[2] Guides to Skip the Lines (And Shame Humankind)," an exposé of the abuse of Walt Disney World's disability accommodations by guests without disabilities.[3] The article paints a lurid portrait of affluent Manhattanites "passing around the name of a 'black market [D]isney guide[,]' an adult who needs a motorized scooter for mobility, and whose presence can take advantage of the rule that 'handicapped' guests can go directly to the front of the line and bring up to five other people along."[4] Author Lisa Belkin quips that these "wealthy parents" use illicit means "so that their darling children don't have to wait on lines for rides" and compares them to airport travelers who use "complimentary wheelchairs . . . [to get] pushed to the front of security lines, only to leap up and sprint to their gates once they have clearance."[5]

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[1] Michael Calderone, *The Huffington Post Is Now HuffPost*, HUFFPOST (Apr. 25, 2017, 12:01 AM), https://www.huffpost.com/entry/huffington-post-huffpost-lydia-polgreen_n_58fce1cae4b00fa7de1522ee [https://perma.cc/GTL7-STQZ].

[2] There is ongoing disagreement over whether people with disabilities should be described in a "people-first" manner (for example, "person with disabilities" or "person with autism") or in an "identity-first" manner (for example, "disabled person" or "autistic person"). Lydia Brown, *Identity-First Language*, AUTISTIC SELF ADVOCACY NETWORK, https://autisticadvocacy.org/about-asan/identity-first-language [https://perma.cc/9YWJ-A9YC] (last visited Apr. 12, 2022). Based on the recommendation of the Autistic Self Advocacy Network, this Note will employ identity-first language with respect to Autism Spectrum Disorders. *Id.* Many autistic individuals believe that identity-first language affirms the centrality of Autism Spectrum Disorders to their identity and experiences, whereas person-first language may suggest that their disability is an affliction worthy of stigma. *Id.* However, this Note will employ person-first language with respect to disability in general, per the suggestion of disability advocacy groups. *See, e.g.*, *People-First Language*, EMP. ASSISTANCE & RES. NETWORK ON DISABILITY INCLUSION, https://askearn.org/topics/retention-advancement/disability-etiquette/people-first-language [https://perma.cc/YM2F-24HA] (last visited Apr. 12, 2022). While some people with disabilities, including many with Autism Spectrum Disorders, choose to use identity-first language, individuals without disabilities are generally encouraged to use people-first language as a means of foregrounding and affirming the personhood of people with disabilities. *Id.*

[3] Lisa Belkin, *Disney World Scam: Wealthy Moms 'Rent' Disabled Guides to Skip the Lines (And Shame Humankind)*, HUFFPOST (May 14, 2013, 7:19 PM), https://www.huffpost.com/entry/skipping-lines-at-disney_n_3275836?guccounter=1 [https://perma.cc/CZ6W-R2CR].

[4] *Id.*

[5] *Id.* (quoting Beth Greenfield, *Disney World Scheme: Entitled Families Hire Disabled Guide to Bypass Lines, Says Report*, YAHOO! LIFE (May 15, 2013), https://www.yahoo.com/lifestyle/tagged/health/parenting/disney-world-scheme--entitled-families-hire-disabled-guide-to-bypass-lines-194555620.

Belkin's article shares only an especially egregious and scandalous type of abuse of disability accommodations occurring at Walt Disney World. However, around the same time in 2013, stories of people without disabilities taking advantage of disability accommodations to skip the lines spread rapidly, creating an image of theme parks overrun with fraudsters clogging the parks' operations and ruining everyone else's expensive, long-awaited Disney vacations.[6] While it is true that this abuse was happening, these articles and televised news reports tapped into a widespread suspicion of disability accommodations under the Americans with Disabilities Act ("ADA") that has also made its way through the courts and into ADA litigation.[7]

This Note will use a Florida Middle District Court case concerning Walt Disney World's queuing accommodations as a study of ADA fraud from both a doctrinal and a policy perspective. The case incorporates the risk of fraud described above into the ADA through Title III by finding that widespread ADA fraud can "fundamentally alter" a business model that relies on the assumption that individuals requesting disability accommodations actually need those accommodations.[8] Consequently, the case raises policy issues surrounding the incorporation of fraud into Title III, in that evidence, observations, and suspicion of fraud are closely related to prejudices against people with disabilities, particularly those with developmental disabilities. In turn, if the case law follows suit by affirming suspicion of people with disabilities and incorporating the risk of fraud into Title III, individuals with disabilities may be disadvantaged by the legal, procedural, and societal manifestations of that suspicion, effectively working against the ADA. This Note will present these ideas as an ongoing balancing test that requires vigilance in fulfilling the ADA's purpose of integrating people with disabilities into public activities and services, concluding that the onus may ultimately be on Congress to update the ADA if the queuing case represents an increasing alarm at ADA fraud in the courts.

II. STATUTORY BACKGROUND

A. TITLE III OF THE AMERICANS WITH DISABILITIES ACT

When Congress enacted the Americans with Disabilities Act on July 26, 1990, it sought, in part, to combat the longstanding, discriminatory exclusion of people with disabilities from public activities and spaces[9] by providing them with legal remedies for ability-based discrimination.[10] Prior to the implementation of the ADA, the United States had a long history of discrimination against people with disabilities, epitomized by nineteenth-

html [https://perma.cc/U9V6-D32A]). It is worth noting that many individuals whose disabilities require the use of mobility devices such as wheelchairs are not paralyzed and can, in fact, walk or run short distances. *See* Lawrence Robinson & Jeanne Segal, *How to Exercise with Limited Mobility*, HELPGUIDE, https://www.helpguide.org/articles/healthy-living/chair-exercises-and-limited-mobility-fitness.htm [https://perma.cc/P4KZ-GX3E] (last updated Oct. 2020).

[6] *See* A.L. v. Walt Disney Parks & Resorts US, Inc., 469 F. Supp. 3d 1280, 1293 (M.D. Fla. 2020).

[7] *See* Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 559 (2020).

[8] *A.L.*, 469 F. Supp. 3d at 1302–03 (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)).

[9] 42 U.S.C.S. § 12101(a)(2) (LexisNexis 2020).

[10] *Id.* § 12101(a)(4).

century "Ugly Laws."[11] The Ugly Laws were enacted to remove beggars from city streets, leading to the forced institutionalization of people with disabilities deemed too unsightly for the public.[12] These laws lasted into the second half of the twentieth century, essentially codifying the exclusion of individuals with disabilities from public spaces.[13] However, the Ugly Laws were not explicitly written to remove people with disabilities from the public eye, but primarily to curb the spread of begging in urban areas.[14] Thus, even when the law was hostile to the interests of individuals with disabilities, it captured a perpetual tension between the sympathetic impulse to help individuals with disabilities and an underlying suspicion of those appearing to abuse their disabilities to gain unfair advantages and services.[15]

To counteract this history of exclusion, Title III of the ADA prohibits discrimination against individuals with disabilities by "public accommodations,"[16] a category of facilities that, while not defined precisely by the ADA, encompasses public services, such as schools and daycares; utilities, such as gymnasiums; places of commerce, such as retail stores and restaurants; transportation locations, such as airports and train stations; and recreation venues, such as theaters, cruise ships, and, most relevant to this Note, amusement parks.[17] This intentional breadth is meant to ensure that people with disabilities can participate in daily activities and access necessities while also enriching their lives with recreation.[18] However, because the ADA relies on both public enforcement by the Attorney General and private enforcement through litigation by individual citizens, the ADA offers only injunctive and not monetary relief, thereby discouraging opportunistic private litigation.[19] Thus, in theory, claimants will not make bad-faith claims seeking money damages but, instead, will complain of discrimination only to receive accommodation and to prevent further discrimination.[20] In practice, this provision can be circumvented by requesting attorney's fees, so some attorneys make businesses out of serially suing public accommodations.[21] Conversely, the fact that injunctive relief is a weaker remedy than monetary damages creates a similarly weaker

[11] Dorfman, *supra* note 7, at 565.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 42 U.S.C.S § 12182 (LexisNexis 2020). The terms "public accommodation," as in a public place of business or service, and "accommodation," as in a means of aiding people with disabilities, may easily be confused with each other. I intend to prevent this confusion by making sure to include the word "public" when referring to public accommodations, so the word "accommodation(s)" without "public" refers only to the second term.
[17] *Id.* § 12181. For the purposes of this Note, I will define "theme parks" as a type of amusement park incorporating themed elements (for example, scenery, live entertainment, and other interactive narrative devices) in the vein of a themed entertainment venue. For a general discussion of the themed entertainment industry, theme parks, and interactive, nonlinear storytelling, see DAVID YOUNGER, THEME PARK DESIGN & THE ART OF THEMED ENTERTAINMENT (1st ed., Inklingwood Press 2016).
[18] Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 377 (2000).
[19] 42 U.S.C.S. § 12188(a)(2); *see also* Colker, *supra* note 18, at 378.
[20] Colker, *supra* note 18, at 383.
[21] *See* Helia Garrido Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address the Need to Improve Access for Individuals with Disabilities*, 26 CORNELL J.L. & PUB. POL'Y 71, 74 (2016); *see also* Carri Becker, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN'S L.J. 93, 108 (2006).

incentive for public accommodations to comply with the ADA; thus, while the unavailability of monetary damages can deter opportunistic litigation, it also can reduce the effectiveness of the ADA.[22]

B. REASONABLE ACCOMMODATIONS AND THE FUNDAMENTAL ALTERATION DEFENSE

Under Title III, a public accommodation discriminates against people with disabilities when it fails to provide "reasonable modifications" to its business in order to accommodate them,[23] or when it fails to provide supplementary services that would allow people with disabilities to use or enjoy its service.[24] The ADA offers limited exceptions or defenses to this requirement of modifications or "reasonable accommodations."[25] Specifically, a public accommodation may not have to accommodate a person with disabilities if doing so would pose a concrete risk to others' health and safety;[26] if making a modification would impose an "undue burden" on the public accommodation;[27] or if such a modification would "fundamentally alter" the public accommodation's business or service.[28]

Whereas the undue burden defense primarily relies on the size and resources of a business and the potential cost of accommodation, the fundamental alteration defense requires a court to identify the essence of a public accommodation's business or service.[29] The Code of Federal Regulations ("CFR") provides factors to consider when conducting an undue burden analysis, and while these factors primarily ask whether a public accommodation can afford a proposed modification, they also include other practical considerations such as patrons' safety, the size and scope of the public accommodation, and the type of business that operates the public accommodation.[30] At first glance, this final item might appear to echo the fundamental alteration defense's question regarding the essence of a public accommodation's business, but these two considerations are distinguishable in that the former considers business structure as a measure of a public accommodation's ability to afford a modification financially, whereas the latter looks to the public-facing purpose of the service.[31]

For example, a significant question in *Roberts v. KinderCare Learning Centers* was whether the service provided by a daycare facility encompassed one-on-one care for a child with developmental disabilities.[32] The court identified the daycare's business model as group care and not individual care, finding, accordingly, that requiring the daycare to assign an aide to the child would fundamentally alter its group-care arrangement.[33] This finding also affected the court's treatment of the daycare facility's undue burden defense,

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[22] Colker, *supra* note 18, at 383.
[23] 42 U.S.C.S. § 12182(b)(2)(A)(ii).
[24] *Id.* § 12182(b)(2)(A)(iii).
[25] *Id.* § 12182 note to decisions 2 (LexisNexis 2020) (Reasonable accommodation).
[26] *Id.* § 12182(b)(3).
[27] *Id.* § 12182(b)(2)(A)(iii).
[28] *Id.* § 12182(b)(2)(A)(ii).
[29] *See, e.g.*, Roberts v. KinderCare Learning Ctrs., 896 F. Supp. 921, 926 (D. Minn. 1995).
[30] 28 C.F.R. § 36.104.
[31] *Roberts*, 896 F. Supp. at 926.
[32] *Id.*
[33] *Id.*

in that its business model was structured around providing fewer than one caretaker per child, as opposed to the individual care that the plaintiff requested.[34] In contrast, the court in *Alvarez v. Fountainhead, Inc.* did not find that training the staff of a preschool to care for students with asthma would constitute a fundamental alteration to its education service because school teachers already monitor their students and are responsible for protecting students' physical health and safety.[35] The court also weighed its rejection of the school's fundamental alteration defense against both the potential threats to the health and safety of others and the risk of an undue burden that would arise from the proposed modifications.[36] With respect to health and safety, it found that the risk of increased liability and the possibility that other students might be tempted to play with the child's inhaler did not outweigh the ADA's foundational purpose of integrating people with disabilities into public activities such as education.[37] With respect to undue burden, the court expanded on the practical considerations laid out in the CFR to encompass administrative, and not solely economic, burdens.[38] To address the defendant's concern that requiring the preschool staff to be responsible for its students with asthma would expose it to potential liability and subsequent economic losses, the court simply noted that the preschool could require the parents of autistic children to waive any such liability.[39] However, just as the *Roberts* court's fundamental alteration analysis was tied to its undue burden analysis, the *Alvarez* court's administrative concerns overlapped with its fundamental alteration considerations, in that it found that requiring the preschool staff to monitor children with asthma would not prevent it from providing its essential childcare service to other children.[40]

Still, in some cases, courts consider a public accommodation's business model primarily with respect to fundamental alteration, suggesting that harm to a public accommodation's market position and earning potential can fundamentally alter its service. For example, the court in *Californians for Disability Rights v. Mervyn's LLC* did not require a department store to remove architectural barriers—for example, merchandise racks creating narrow walkways—in order to accommodate guests who used wheelchairs and other mobility devices because the arrangement of merchandise was essential to direct consumers' engagement with the merchandise and, by extension, the store's business model.[41] However, the court also noted that the store could lay out its merchandise in different, more accessible ways that would constitute reasonable accommodations, even though the store's architectural layout excluded some people with disabilities.[42] While these considerations seem to fit under the undue burden defense, the court in

[34] *Id.* at 927.
[35] Alvarez v. Fountainhead, Inc., 55 F. Supp. 2d 1048, 1052 (N.D. Cal. 1999).
[36] *Id.* at 1053.
[37] *Id.* at 1053–54.
[38] *Id.* at 1053.
[39] *Id.* at 1054.
[40] *Id.*
[41] Californians for Disability Rights v. Mervyn's LLC, 81 Cal. Rptr. 3d 144, 156–57 (Cal. Dist. Ct. App. 2008). The court also found that the store would not have incurred any undue burden or great cost. *Id.* at 160.
[42] *Id.* at 148.

Mervyn's did not address undue burden, instead raising business and administrative issues under the fundamental alteration defense.[43] Further, the court in *Disability Advocates, Inc. v. Paterson* found that, even though for-profit adult homes for individuals with mental illness had customarily segregated their residents from people without disabilities in order to ensure that they would depend on and pay for housing, it was necessary to fundamentally alter the adult homes' business model in order to integrate people with disabilities into public activities and prevent discrimination against them.[44] Even though these cases have distinguishable outcomes, they both illustrate that courts can consider a public accommodation's business model under both the undue burden defense and the fundamental alteration defense.

The question of what constitutes a fundamental alteration reached the Supreme Court in *PGA Tour, Inc. v. Martin*, in which Casey Martin, a professional golf player with a circulatory disorder,[45] sued the Professional Golfers' Association of America ("PGA") Tour for permission to use a golf cart between the holes of the course.[46] To demonstrate why the requested accommodation was reasonable, the Court presented two categories of changes or accommodations that would have fundamentally altered the golf game: (1) changing the parameters of the game—for instance, the diameter of the holes—for all players, and (2) changes that would give players with disabilities advantages over other players.[47] The use of golf carts did not ultimately fit in either of these categories because the game's essential aspect was shot-making,[48] which would not be affected by a player's use of a golf cart.[49] The PGA Tour contested this assertion, claiming that the fatigue created by its walking rule was meant to be equal for all players.[50] Still, the Court found that this fatigue was insignificant and that its absence would not actually create an advantage for players receiving disability accommodations.[51] Thus, because the proposed accommodation, first, was not closely related to the essence of the game and, second, would not generate new inequalities between its players, the Court approved the accommodation.[52]

III. A BRIEF HISTORY OF DISNEY PARKS'S DISABILITY ACCOMMODATIONS

Disney Parks, Experiences and Products ("Disney Parks")[53] operates a variety of themed entertainment endeavors internationally, including hotels,

[43] *Id.*
[44] Disability Advocs., Inc. v. Paterson, 653 F. Supp. 2d 184, 256 (E.D.N.Y. 2009).
[45] PGA Tour, Inc. v. Martin, 532 U.S. 661, 668 (2001).
[46] *Id.* at 665.
[47] *Id.* at 683.
[48] *Id.*
[49] *Id.* at 683–84.
[50] *Id.* at 686.
[51] *Id.* at 687.
[52] *Id.* at 691.
[53] A subsidiary of the Walt Disney Company, formerly known as Walt Disney Parks and Resorts. Press Release, The Walt Disney Company Announces Strategic Reorganization (Mar. 14, 2018), https://thewaltdisneycompany.com/walt-disney-company-announces-strategic-reorganization [https://perma.cc/BWM3-5CWP].

a cruise line, and, most significantly here, theme parks.[54] Disney Parks operates two theme park resorts in the United States, Disneyland Resort in California and Walt Disney World Resort in Florida, and each resort consists of multiple theme parks, hotels, and other entertainment venues.[55] Its theme parks contain a variety of rides, shows, and other attractions, many of which have queuing times as short as zero to twenty minutes, or as long as multiple hours.[56]

On October 9, 2013, Disney Parks updated its system of queuing accommodations for guests with disabilities, replacing its Guest Assistance Card ("GAC") with the new Disability Access Service ("DAS").[57] Formerly, the GAC allowed guests who claimed to have a disability to skip the lines at the parks' rides and attractions and was structured around tiers corresponding to varying levels of need for accommodation.[58] Thus, guests asserting that their disabilities prevented them from waiting in any lines received cards allowing them unlimited front-of-the-line access to the parks' attractions.[59] In addition, Disney Parks offered a complimentary "FastPass" system that allowed all guests—with or without disabilities requiring accommodation—to schedule appointments to return to popular attractions with reduced wait times.[60] Guests holding GACs also entered through the separate, shorter FastPass queues.[61]

In theory, this high degree of access was intended for guests with a similarly high degree of need.[62] In practice, guests who did not actually require such accommodations requested the highest-tier GAC in droves, abusing the GAC system and inflating wait times across Disney Parks in the United States.[63] Because Disney Parks employees, or "Cast Members," are not legally permitted to ask guests to prove their disabilities or to disclose their diagnoses, an increasing number of guests learned that they could maximize the number of marquee attractions they experienced by requesting a GAC.[64]

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[54] *About the Walt Disney Company*, WALT DISNEY CO. (2020), https://thewaltdisneycompany.com/about/#our-businesses [https://perma.cc/C7SY-YYNY].

[55] Parks and Destinations, DISNEY PARKS (2020), https://disneyparks.disney.go.com/disney-vacations [https://perma.cc/ZFQ3-A4YD].

[56] A.L. v. Walt Disney Parks & Resorts US, Inc., 469 F. Supp. 3d 1280, 1291 (M.D. Fla. 2020). For a summary of the procedural history of the case, see Dorfman, *supra* note 7, at 586–87. For a brief discussion of "queuing theory," a system applied by Disney Parks's industrial engineers to optimize guest experience, see *A.L.*, 469 F. Supp. 3d at 1306.

[57] *Id.* at 1292; *see also* Thomas Smith, *Guest Assistance Card Program Update for Walt Disney World Resort, Disneyland Resort*, DISNEY PARKS BLOG (Oct. 4, 2013), https://disneyparks.disney.go.com/blog/2013/10/guest-assistance-card-program-update-for-walt-disney-world-resort-disneyland-resort [https://perma.cc/XJ3X-XPCL].

[58] *A.L.*, 469 F. Supp. 3d at 1293–94.

[59] *Id.*

[60] *Id.* at 1291. The FastPass system was replaced by the Disney Genie Service in 2021. Avery Maehrer, *Disney Genie Service to Reimagine the Guest Experience at Walt Disney World Resort and Disneyland Resort*, DISNEY PARKS BLOG (Aug. 18, 2021), https://disneyparks.disney.go.com/blog/2021/08/introducing-disney-genie [https://perma.cc/3BWX-ZNZP].

[61] *A.L.*, 469 F. Supp. 3d at 1293–95.

[62] *Id.*

[63] *Id.*

[64] *Id.*

Beyond abusive requests for accommodation, guests exploited the GAC using a variety of fraudulent and opportunistic methods.[65] Some guests sold expired GAC passes on the Internet, created counterfeit passes, or advertised unapproved "tours" of Walt Disney World using the GAC.[66] Information about these strategies spread on blogs, through news outlets, and by word of mouth, and they became so widespread that, at one point, over ninety percent of Disney Parks guests visiting Guest Relations requested the highest-tier GAC.[67] The parks' ride capacity could not support this influx of guests circumventing the standby queues, with FastPass lines so full of guests using the GAC that they spilled over into walkways and slowed the parks' operations.[68]

In April 2013, Disney Parks conducted a study of the GAC in Walt Disney World, collecting data on the number of GAC passes distributed and the number of times that guests used their GAC passes to enter attractions through their FastPass lines.[69] Disney Parks found that, while about three percent of park guests received a GAC, a disproportionate number of guests entering the most popular rides through their FastPass lines did so using a GAC.[70] For instance, thirty percent of guests entering through the FastPass line of the game-based ride Toy Story Mania, whose interactive elements and scoring system encouraged guests to return repeatedly, used the GAC.[71] As a result, guests possessing the GAC were found to ride Toy Story Mania ten times more often than guests without the GAC.[72]

In response to these findings, the DAS, which replaced the GAC, was designed to be more restrictive in offering queuing accommodations, thereby defending the parks against the fraud and abuse that occurred with the GAC. Like the FastPass system, the DAS allows guests with disabilities to schedule only one appointment or active "return time" until they use their pass or their one-hour redemption window lapses.[73] Using the DAS, guests do not have to wait in line[74] and instead can enjoy the parks' other offerings while they wait to return to an attraction.[75] When Disney Parks employed its FastPass system, guests could use it in conjunction with the DAS, significantly reducing the amount of time they spent waiting in line compared to other guests and increasing the amount of time they spent experiencing the parks' attractions.[76]

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[65] *Id.* at 1293–94. For examples of these articles, see Belkin, *supra* note 3, and Jeff Rossen & Josh Davis, *Undercover at Disney: 'Deplorable' Scheme to Skip Lines*, TODAY (May 31, 2013, 4:32 AM), https://www.today.com/news/undercover-disney-deplorable-scheme-skip-lines-6C10131266 [https://perma.cc/2R38-ZK9R].

[66] *A.L.*, 469 F. Supp. 3d at 1293.

[67] *Id.*

[68] *Id.* at 1294.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 1295; *see also Services for Guests with Disabilities*, WALT DISNEY WORLD (2020), https://disneyworld.disney.go.com/guest-services/guests-with-disabilities [https://perma.cc/63CW-2A4D].

[74] Here, "in line" refers to a physical queue, as opposed to a virtual line or other system of waiting.

[75] *A.L.*, 469 F. Supp. 3d at 1294.

[76] *Id.* at 1295; *see also Services for Guests with Disabilities*, *supra* note 73. This is now true of the Disney Genie Service as well, though the events of the A.L. case occurred before the FastPass program ended. Maehrer, *supra* note 60.

Unlike the GAC, the DAS is available only to guests whose disabilities prevent them from waiting in line, even with a mobility device such as a wheelchair.[77] Guests using mobility devices are still required to wait in standby lines as long as they can accommodate a standard wheelchair.[78] As a result, the DAS, in some respects, provides more accommodation for indviduals with developmental disabilities than those with mobile disabilities.[79] For example, some autistic guests cannot remain in confining spaces for extended periods of time, so the DAS allows them to wait elsewhere.[80] Disney Parks also offers other resources, such as general guides and individualized consultations, both online and in its theme parks, to help guests with disabilities plan their visits.[81]

IV. CASE STUDY: *A.L. V. WALT DISNEY PARKS & RESORTS, INC.*

A. FACTUAL BACKGROUND

On December 19, 2013, shortly after Disney Parks replaced the GAC with the DAS, A.L., an autistic man, visited the Magic Kingdom Park in Walt Disney World with his mother, D.L., and a party of four other family members and friends.[82] A.L., who was about twenty years old at the time of the visit, was cared for by his mother, who provided him with food, clothing, and a schedule to prevent him from becoming anxious or overwhelmed and consequently having meltdowns.[83] According to his mother, A.L. had difficulty telling and comprehending time, so he struggled to wait in any line for more than fifteen to twenty minutes without having a meltdown.[84] As a result, before he and his mother would visit a theme park such as the Magic Kingdom, he would formulate a route around the park and a sequence in which to complete his desired attractions and activities.[85] Prior to Disney Parks's implementation of the DAS, A.L. used the GAC to carry out his plans and to avoid waiting in long lines, both of which helped him avoid meltdowns.[86]

Accordingly, before visiting the Magic Kingdom with A.L., D.L. contacted Disney's customer service to speak with a disability relations specialist, and she was granted three readmission passes to supplement the DAS.[87] When D.L. arrived at the Magic Kingdom with her son and the rest of their party, she waited at Guest Relations to receive the DAS designation

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[77] *Services for Guests with Disabilities*, *supra* note 73.

[78] *See Services for Guests with Mobility Disabilities*, WALT DISNEY WORLD (2022), https://disneyworld.disney.go.com/guest-services/mobility-disabilities [https://perma.cc/7AFQ-V7QY].

[79] *See Services for Guests with Disabilities*, *supra* note 73.

[80] *A.L.*, 469 F. Supp. 3d at 1295–96.

[81] *Id.*; *see also Services for Guests with Disabilities*, *supra* note 73.

[82] *A.L.*, 469 F. Supp. 3d at 1297.

[83] *Id.* at 1287–88. While tantrums are typically children's strategic, self-determined way of getting what they want, meltdowns are involuntary, automatic responses to overstimulation. Kim Barloso, *Managing Autism Meltdowns, Tantrums and Aggression*, AUTISM PARENTING MAG. (May 7, 2021), https://www.autismparentingmagazine.com/autism-meltdowns [https://perma.cc/U6HE-SDCH].

[84] *A.L.*, 469 F. Supp. 3d at 1288.

[85] *Id.* at 1297–98.

[86] *Id.*

[87] *Id.*

and the additional readmission passes but was ultimately dissatisfied with the accommodations, feeling that they were insufficient compared to the GAC.[88] Guest Relations Cast Members subsequently issued D.L. four further readmission passes per guest in her party and explained how A.L. could use the DAS to follow his planned route, but D.L. still did not believe that these measures were sufficient to accommodate her son.[89] After beginning with A.L.'s route and learning that the DAS required her party to wait to return to attractions before entering them, D.L. deviated from A.L.'s plan by directing the party to spend most of the evening enjoying the park's other attractions and entertainment offerings.[90]

D.L. maintained that the DAS did not properly accommodate her son, even in conjunction with the FastPass system and the extra readmission passes she was provided, and even though she did not make efforts to use the park's other planning and queue-skipping systems.[91] She also noted that other theme parks such as Universal Studios Orlando still offered A.L. unlimited front-of-the-line access and that the Disney Cruise Line provided A.L. and his family with early boarding times and individual, scheduled meals.[92] In general, D.L. expressed concern that the new combination of accommodations that Disney Parks offered would not allow her son to conform to his predetermined route and, therefore, prevent him from participating in the theme parks' activities alongside guests without disabilities.[93] Thus, A.L. sought injunctive relief entitling him to unlimited FastPasses or a similar accommodation.[94]

B. THE *A.L.* COURT'S FUNDAMENTAL ALTERATION ANALYSIS

While the Florida Middle District Court empathized with D.L.'s desire to provide her son with recreational activities without subjecting him to overstimulation or frustration that would lead to meltdowns, it dismissed the case on the basis that reinstating the GAC or a similar all-inclusive system would fundamentally alter Disney Parks's business model.[95] In its decision, the court first looked to the "essential aspect" of a visit to the Magic Kingdom Park.[96] Based on evidence from Disney Parks guest surveys indicating that guest satisfaction and, in turn, the likelihood of guests to return to the parks depended on guests' ability to experience marquee attractions, the court found that the queuing system that Disney Parks had developed to maximize guest satisfaction was essential to its business model.[97]

On its own, Disney Parks's independent finding that issuing autistic guests the accommodations that A.L. requested would increase wait times for all other guests by about 97 percent was persuasive but not dispositive.[98]

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[88] *Id.*
[89] *Id.*
[90] *Id.* at 1298.
[91] *Id.* at 1299.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 1286.
[95] *Id.* at 1315.
[96] *Id.* at 1307.
[97] *Id.* at 1314.
[98] *See id.*

Rather, it was the likely unmanageable magnitude of requests for GAC-like accommodations, as demonstrated by the history of the GAC, that led the court not to require such accommodations.[99] Even more specifically, the fact that a large number of requests would have come from guests not in need of accommodations and, therefore, would have been abusive, convinced the court that requiring Disney Parks to reinstate the GAC or a similar system would fundamentally alter its business model.[100]

V. HOW *A.L. V. WALT DISNEY PARKS & RESORTS* INCORPORATES THE RISK OF FRAUD INTO THE ADA THROUGH THE FUNDAMENTAL ALTERATION DEFENSE: STATUTORY AND POLICY EFFECTS

The decision in *A.L.*, in some ways, seems to run counter to the motivation underlying the ADA. First, nowhere does Title III of the ADA mention fraud as a defense against reasonable accommodation,[101] but the court's reasoning here turned on the risk of abusive or fraudulent requests for accommodation.[102] Second, the fundamental alteration defense similarly does not explicitly equate the nature of a service with the business considerations, such as profit,[103] that arose in *A.L.*[104] Third, the court in *A.L.* stated that Disney Parks's inability to request proof of disability increased the risk of fraud under the GAC, [105] but the law against requests for proof of disability aligns with the ADA's purpose of curbing everyday types of discrimination against people with disabilities.[106] While the purpose of the ADA is to integrate people with disabilities into public activities by combating discrimination against them,[107] the court's reasoning in *A.L.* centers on business considerations that outweigh the risk of discrimination.[108] *A.L.* is notable and unusual, in that it expands the fundamental alteration doctrine by invoking of the risk of fraudulent requests for disability accommodation under the fundamental alteration defense. In doing so, however, it might also incorporate societal prejudices against people with disabilities, ultimately working against the ADA.

The following Section will examine two types of fundamental alteration cases: (1) a case not involving fraud but hinging on a concern for operational efficiency, and (2) cases involving fraud whose outcomes favored the claimants. Distinguishing *A.L.* from these cases will establish that *A.L.* expands on the Title III fundamental alteration defense to incorporate the risk of fraud based on the magnitude of the fraud, the business effects of the fraud, and a lack of protections against fraud. Subsection B will address policy concerns surrounding the incorporation of the risk of fraud into the

[99] *Id.*
[100] *Id.*
[101] *See* 42 U.S.C.S. § 12182 (LexisNexis 2020).
[102] *A.L.*, 469 F. Supp. 3d at 1314.
[103] 42 U.S.C.S. § 12182(b)(2)(A)(iii)–(iv).
[104] *A.L.*, 469 F. Supp. 3d at 1314.
[105] *Id.* at 1293.
[106] 42 U.S.C.S. § 12182(b)(2).
[107] *Id.*
[108] *A.L.*, 469 F. Supp. 3d at 1314.

ADA through the fundamental alteration defense, including social prejudices towards people with disabilities and the judicial and business implications of fraudulent requests for accommodation.

A. *A.L.*'S EXPANSION OF THE FUNDAMENTAL ALTERATION DOCTRINE: DISTINCTIONS FROM OTHER FUNDAMENTAL ALTERATION CASES

1. Operational Efficiency in the Absence of Fraud

One case that the Florida Middle District Court distinguished from *A.L.* is *J.D. v. Colonial Williamsburg Foundation*, in which the Fourth Circuit Court found that allowing a child with a severe gluten sensitivity to eat a homemade lunch inside a restaurant might not fundamentally alter the restaurant's business model.[109] The defendant operated an educational themed entertainment venue with attractions emulating 18th-century Williamsburg, including Shields Tavern, a restaurant with live entertainment.[110] When the plaintiff, J.D., visited the restaurant with a homemade lunch that would not aggravate his severe gluten sensitivities, a manager asked him and his father to leave the restaurant and eat the food outside.[111] The plaintiff claimed that allowing him to eat his own food in the restaurant was a reasonable accommodation, but the defendant asserted that the accommodation would fundamentally alter its essential food service and accompanying theme.[112]

The court in *J.D.* analogized to *PGA Tour* to identify food service as the essential aspect of Shields Tavern's business model under the fundamental alteration defense.[113] The court acknowledged that a jury could find for either party, but in reversing the district court's decision in favor of the Colonial Williamsburg Foundation, it found no evidence that Colonial Williamsburg had received many other guests requesting to bring their own food into the restaurant.[114] Accordingly, it concluded that accommodating a small number of guests with food sensitivities might not fundamentally alter the restaurant's service or, by extension, harm the restaurant's business.[115] Unlike in *A.L.*, the accommodation in *J.D.* would not provide guests advantages over each other, nor would it significantly impede the restaurant's operations. Thus, *J.D.* elaborates on the PGA Tour case by introducing business efficiency as an additional consideration under the fundamental alteration defense, as opposed to the undue burden defense.[116] In other words, excessive operational encumbrances, costs included, may fundamentally alter a public accommodation's business model.[117] By extension, if a Title III accommodation of individuals with disabilities significantly increases a public accommodation's operating costs, then it might constitute a fundamental alteration.

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[109] J.D. v. Colonial Williamsburg Found., 925 F.3d 663, 676–77 (4th Cir. 2019).
[110] *Id.* at 668.
[111] *Id.* at 668–69.
[112] *Id.* at 671–72.
[113] *Id.* at 676.
[114] *Id.* at 676–77.
[115] *Id.*
[116] 42 U.S.C.S. § 12182(b)(2)(A)(iv) (LexisNexis 2020).
[117] *See* Alumni Cruises, LLC v. Carnival Corp., 987 F. Supp. 2d 1290, 1310 (S.D. Fla. 2013).

Still, the court in *J.D.*, like the courts in many other fundamental alteration cases such as *PGA Tour*, did not consider the risk of fraud that arose in *A.L.* In theory, there is room for fraudulent or abusive requests for accommodation in both of these cases, particularly in *PGA Tour*. Contrary to the majority's claim that the accommodations would be limited to just a few guests, the dissent in *J.D.* asserted that the requested accommodation would open the door to other restaurants receiving pressure to allow patrons to bring in outside food, potentially overriding health and safety laws and the basic idea of food service.[118] While the dissenting judge did not explicitly mention fraud, it is not difficult to imagine guests without food sensitivities or other disabilities simply preferring to eat their own food in a restaurant and thus fraudulently requesting the same accommodation as J.D.

However, unlike in *PGA Tour*, such requests would not create competition or unfair advantages between restaurant patrons with and without dietary restrictions or other disabilities beyond filling space in restaurants with guests who do not intend to purchase food. In *PGA Tour*, if the fatigue created by the walking rule were not negligible, then using a golf cart would be advantageous.[119] In turn, golfers without disabilities might be compelled to request to use golf carts in tournaments to gain advantages over players experiencing fatigue from walking. Nevertheless, because the Supreme Court found that the fatigue created by the walking rule did not meaningfully change the golf game,[120] it was unnecessary for it to approach the issue of potential Title III fraud. Thus, fraud in requesting accommodations might not arise unless, independent of non-fraudulent requests for accommodation, it would fundamentally alter a service by significantly increasing the number of requested accommodations. Accordingly, as the next section will discuss, Title III fraud needs to rise to a high level of significance and business impact to convince a court that it is worth weighing against the risk of discrimination.

2. Cases of Fraud That Do Not Fundamentally Alter Public Accommodations

There are relatively few cases in which the risk of Title III fraud arises as a fundamental alteration consideration, and there are even fewer whose outcomes are favorable to public accommodations. For example, in *Dudley v. Hannaford Bros. Co.*, a supermarket refused to allow a patron with disabilities to purchase a pack of wine coolers because he appeared to be drunk.[121] In fact, the patron's flushed face and unsteady posture[122] were the products of major injuries he had sustained in a car accident.[123] However, in order to avoid putting its liquor license at risk and making itself liable for selling alcohol to intoxicated patrons,[124] the supermarket followed a policy

[118] *J.D.*, 925 F.3d at 680.
[119] PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 (2001).
[120] *Id.*
[121] Dudley v. Hannaford Bros. Co., 333 F.3d 299, 302 (1st Cir. 2003).
[122] *Id.*
[123] *Id.* at 301.
[124] *Id.* at 309.

strictly forbidding its manager from reconsidering its clerks' refusal to sell alcohol to any patrons who appeared to be intoxicated.[125]

As in *A.L.*, the supermarket argued that accommodating the patron's disabilities by reconsidering its initial decision not to sell him alcohol would open the door to fraudulent disability claims that could fundamentally alter its business.[126] Specifically, the supermarket claimed that potentially selling alcohol to patrons falsely claiming not to be intoxicated but to have disabilities would prevent it from selling alcohol to other patrons in the future, thus fundamentally altering its business model.[127] Nevertheless, the court rejected the supermarket's concerns as a "parade of horribles," asserting that the risk of fraud that would potentially allow intoxicated patrons to buy alcohol did not outweigh the ADA's purpose of preventing discrimination against patrons with disabilities.[128]

This case is distinguishable from *A.L.* in three important ways. First, just as the court in *J.D.* found the claimant's requested accommodations to be reasonable because they applied only to a narrow set of guests,[129] the court in *Dudley* found that allowing the supermarket to reconsider its refusal to sell alcohol to patrons displaying the effects of intoxication would not necessarily lead to widespread fraud or abuse.[130] Second, unlike in *A.L.*,[131] the supermarket was permitted to request that its guests provide proof of disability,[132] providing a safeguard against fraud that Disney Parks did not have in administering the GAC.[133] Third, because the supermarket would likely only need to request proof from patrons displaying signs of inebriation, the simplicity and efficiency of its reconsideration policy were insignificant compared to the possibilities of exclusion of and discrimination against its patrons with disabilities.[134]

One area of Title III litigation in which the knowledge of widespread fraud has arisen as a significant consideration is cases involving service animals. In two 2014 cases, *Hurley v. Loma Linda University Medical Center*, and *Sabal Palm Condominiums of Pine Island Ridge Association, Inc. v. Fischer*, plaintiffs with disabilities sued public accommodations for permission to use service dogs in a hospital[135] and a housing complex,[136] respectively. In both of these cases, the courts explicitly cited the problem of widespread service animal fraud, explaining that, similar to the no-questions-asked rule in *A.L.*, public accommodations were not permitted to ask guests with purported service animals to prove that their animals were not "fake service [animals]."[137] The court in *Hurley* noted that this abuse produced a

[125] *Id.* at 301.
[126] *Id.* at 309.
[127] *Id.*
[128] *Id.*
[129] J.D. v. Colonial Williamsburg Found., 925 F.3d 663, 676–77 (4th Cir. 2019).
[130] *Dudley*, 333 F.3d at 310.
[131] A.L. v. Walt Disney Parks & Resorts US, Inc., 469 F. Supp. 3d 1280, 1292 (M.D. Fla. June 22, 2020).
[132] *Dudley*, 333 F.3d at 310.
[133] *A.L.*, 469 F. Supp. 3d at 1293.
[134] *Dudley*, 333 F.3d at 310.
[135] Hurley v. Loma Linda Univ. Med. Ctr., 2014 U.S. Dist. LEXIS 18018, at *21 (C.D. Cal. 2014).
[136] Sabal Palm Condos. of Pine Island Ridge Ass'n v. Fischer, 2014 U.S. Dist. LEXIS 32705, at *13 (S.D. Fla. 2014).
[137] *Id.* at *5.; *see also Hurley*, 2014 U.S. Dist. LEXIS 18108, at *25–26.

reasonable distrust of people using service animals, but that this distrust ultimately hurts individuals with disabilities.[138] While the court in *Hurley* did not address the fundamental alteration issue beyond a brief mention, the *Sabal Palm* court found, quite simply, that permitting a Sabal Palm resident with disabilities to keep a service animal would not fundamentally alter Sabal Palm's service because it could continue to offer housing.[139] Even though the *Sabal Palm* court acknowledged that there was a risk of fraud in requesting service animal accommodations, it granted the requested accommodation for two reasons: (1) the plaintiffs actually had diagnosed disabilities and had registered their service dog properly,[140] and (2) many states protected against fraud by outlawing the use of fake service animals.[141]

The court in *Sabal Palm* did not, however, address the business implications of allowing service animals into the housing facility because it held the accommodation to be reasonable and necessary.[142] It found that the essence of the housing facility's service was to provide housing and that allowing residents to own service animals would not affect that essence.[143] Further, the facility itself conceded that allowing its residents to own service animals would not cause it to incur any great additional expense.[144] Thus, unlike in *A.L.*, the risk of fraud was unrelated to the risk of adverse business effects. Even if the risk of fraud were so great that the housing facility would have to invest in accommodating service animals, laws against fake service animals protected it against those expenditures. As a result, the court in *Sabal Palm* was able to avoid addressing the uncomfortable question of whether the suspicion of people with disabilities, aggravated by widespread service animal fraud, could validly prevent the implementation of an otherwise reasonable accommodation.

This uncomfortable question was at the center of *A.L.* because the mitigating factors present in the above cases were absent from Disney Parks's unique business model. Thus, the Florida Middle District Court was required to consider whether the risk of Title III fraud under an all-inclusive system such as the GAC outweighed the risk of discrimination against people with disabilities under a narrower system such as the DAS. As such, it implicitly accounted for a suspicion of people requesting disability accommodations and, possibly by extension, of people with disabilities in general. The following section will consider policy perspectives on the unusual outcome of the A.L. case, surveying factors including suspicion of people with disabilities, social views of disability accommodations, and the implementation of policies that set out to defend against ADA fraud.

[138] *Hurley*, 2014 U.S. Dist. LEXIS 18108, at *25–26.
[139] *Sabal Palm*, 2014 U.S. Dist. LEXIS 32705, at *46–47.
[140] *Id.* at *2.
[141] *Hurley*, 2014 U.S. Dist. LEXIS 18108, at *26.
[142] *Sabal Palm*, 2014 U.S. Dist. LEXIS 32705, at *47–48.
[143] *Id.* at *47.
[144] *Id.* at *45–46.

B. POLICY CONSIDERATIONS: PERSPECTIVES ON DISABILITY, "DESERVINGNESS," AND EFFICIENCY

Among fundamental alteration cases, *A.L.* is exceptional in that the risk of fraudulent requests for accommodation was dispositive. Even in cases such as *Sabal Palm* and *Hurley*, in which fraud was a prevalent issue, courts were reluctant to hinge decisions denying accommodations on deterring, disincentivizing, or otherwise curbing the effects of fraud.[145] These cases reveal an underlying conflict in Title III litigation between believing and accommodating people with disabilities, and preventing patrons of public accommodations from fraudulently using disability accommodations to gain advantages over other patrons. Whereas the former side of this conflict captures the ADA's purpose of preventing discrimination against people with disabilities, the latter points to widespread suspicion of people with disabilities. *A.L.* epitomizes this conflict in that, even though the court found the plaintiff's requested accommodations to be unreasonable, his interests were directly at odds with Disney Parks's interest in preventing real fraud being committed by thousands of guests without disabilities requiring accommodation.

The following subsection will define "deservingness" and explain how, as a concept, it leads to policies that can both defend against ADA fraud and disadvantage people with disabilities. The subsequent subsection will provide deservingness analyses of defensive policies towards emotional support animals and frivolous ADA litigation to illustrate the balancing tests inherent in ADA policy. It will be followed by an additional subsection discussing another internal tension in the ADA between business concerns and the prevention of discrimination against individuals with disabilities.

1. Deservingness and Defensive Policies

While it is true that Title III fraud and abuse occur, some academics have pointed to a "moral panic" about the abuse of disability accommodations by "fakers" without disabilities as a factor working against the efficacy of the ADA.[146] Doron Dorfman, Associate Professor of Law at Syracuse University compares the A.L. case to parking placard fraud, or the use of parking accommodations by drivers without disabilities, concluding that suspicion of people requesting disability accommodations does not depend on the scarcity of resources or concrete evidence of fraud, but on a sense of fairness and "deservingness."[147] Deservingness is a concept in social policy studies that gauges public support for welfare services, and it can be applied to studies of public support for disability accommodations.[148] Put more simply, deservingness assesses whether the public believes that individuals with disabilities deserve accommodation.[149] Dorfman points out that suspicion of people fraudulently requesting disability accommodations is widespread

[145] *Id.* at *45–46; *Hurley*, 2014 U.S. Dist. LEXIS 18108, at *26; *see also* Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947 (E.D. Ca. 1990); Rose v. Springfield-Greene Cnty. Health Dep't, 66 F. Supp. 2d 1206 (W.D. Mo. 2009).
[146] *See* Dorfman, *supra* note 7, at 559.
[147] *Id.* at 567.
[148] *Id.* at 562–63.
[149] *Id.*

among the American public and affects a variety of types of accommodations, including public benefits payments, educational accommodations, and, as above, service animals.[150] Specifically, people with disabilities must navigate "defensive policies" that seek to prevent fraud, and they face harassment and questioning about their disabilities due to this widespread suspicion.[151]

The idea of deservingness that motivates these defensive policies and actions particularly affects people with invisible disabilities[152] including Autism Spectrum Disorders because observers cannot immediately identify whether the former actually need and, therefore, deserve the accommodations that they request.[153] The issue of invisible disabilities is especially relevant to DAS cases because the DAS, first, does not require that guests disclose or prove their diagnoses and, second, does not accommodate guests whose disabilities require that they use mobility devices,[154] which are visual indications of disability.[155] Attorney Marie Michel suggests that, because the public imagination of disability revolves around visible disabilities that require mobility devices, people with invisible disabilities are especially susceptible to discrimination under the ADA.[156] For example, travel companies often view people with invisible disabilities as not having legitimate disabilities and, consequently, deny them accommodation.[157]

Michel points to the A.L. case as an example of the denial of necessary Title III accommodations to autistic people, asserting that individuals with invisible disabilities often have difficulty receiving accommodations that would allow them to enjoy vacations and leisure activities.[158] In turn, they are less able than other vacationers to enjoy these activities, which Michel asserts, in accordance with the ADA,[159] are necessary to improve their quality of life.[160] She explains that travel companies might be reluctant to incur the costs created by disability accommodations, especially because it is generally unlikely that denying such accommodations would result in litigation.[161] Even when people with invisible disabilities, including Autism Spectrum Disorders, are legally entitled to accommodation, their inability to visually demonstrate their deservingness of accommodation can continue to disadvantage them and segregate them from people without disabilities. Likewise, Dorfman contends that, despite the court's decision in *A.L.* hinging

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[150] *Id.* at 561–62 (citing generally Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Disclosure*, 53.4 LAW & SOC'Y REV. 1051 (2019)).

[151] *Id.* at 564.

[152] For more information on invisible disabilities, see *Invisible Disabilities: List and General Information*, DISABLED WORLD, https://www.disabled-world.com/disability/types/invisible [https://perma.cc/97XS-86KH] (last updated Sept. 10, 2020).

[153] Dorfman, *supra* note 7, at 596–97.

[154] *See Services for Guests with Disabilities*, *supra* note 73.

[155] *See* Dorfman, *supra* note 7, at 588.

[156] *See* Marie Michel, *Travelling Through Title III: The Difficulties of Accessing Reasonable Accommodations for People with Mental or Developmental Disabilities While on Vacation*, 17 Rutgers J.L. & Pub. Pol'y 403, 404–07 (2020).

[157] *Id.* at 408.

[158] *Id.* at 407

[159] 42 U.S.C.S. § 12182 note to decision 23 (LexisNexis 2020) (Entertainment facilities); *see also* Colker, *supra* note 18, at 377.

[160] Michel, *supra* note 156, at 410–27.

[161] *Id.* at 407.

on evidence of widespread abuse of the GAC, Disney Parks denied A.L. accommodations in order to preserve its public image.[162] He points in particular to "the 'tour guides' scandal,"[163] asserting that the negative attention that Disney Parks received in 2013 motivated it to adopt the DAS as a defensive measure.[164] However, this defense, he says, was not against fraud or abuse, but against accusations of accommodating guests who did not deserve accommodations: a moral failure rather than an operational error.[165]

2. "Mitigating Measures" as a Judicial Application of Deservingness

Abuse of disability accommodations such as the GAC does, in fact, occur; the question, then, is whether it occurs at a scale or rate that necessitates defensive policies such as the comparatively narrow and arguably less accommodating DAS, or whether defensive policies are the product of a moral panic regarding deservingness. Professor Robert Burgdorf Jr. of the University of the District of Columbia explains that the ADA is framed around social and civil rights concerns rather than medical concerns, and, as a result, it is affected by socially constructed beliefs, values, and stereotypes.[166] He argues, like Dorfman, that these social norms have led to the adoption of defensive policies not only by public accommodations, but also by the courts.[167] In particular, he finds courts' consideration of "mitigating measures," or actions taken by people with disabilities to alleviate or overcome their disabilities (for example, wearing hearing aids), to be a factor working against the full realization of the ADA's purpose of preventing discrimination against people with disabilities.[168]

Between 1974 and 1984, only one federal district court found a plaintiff not to have a disability under the Rehabilitation Act, a predecessor of the ADA.[169] Accordingly, there was little disagreement among experts that mitigating measures should not be a factor in determining an individual's eligibility for accommodation.[170] However, in three 1999 cases, the United States Supreme Court began considering mitigating measures as a factor cutting against the approval of accommodations, allowing public accommodations to deny disability accommodations to patrons taking measures to mitigate the effects of their disabilities (for example, permitting a company to discriminate against people using hearing aids by not adjusting its sound systems).[171] These decisions called into question whether people with disabilities who took mitigating measures could be considered under

[162] Dorfman, *supra* note 7, at 603.
[163] *See* A.L. v. Walt Disney Parks & Resorts US, Inc., 469 F. Supp. 3d 1280, 1293 (M.D. Fla. June 22, 2020).
[164] Dorfman, *supra* note 7, at 603.
[165] *See id.*
[166] Robert L. Burgdorf, *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. ON C.L. & C.R. 241, 265 (2008).
[167] *Id.* at 259. Because the courts adopt these defensive policies as a manifestation of a fraud-averse interpretation of the ADA, it may be worthwhile for Congress to amend the ADA to clarify whether notions of deservingness should play a role in its application.
[168] *Id.* at 260.
[169] *Id.* at 257.
[170] *Id.* at 260.
[171] *Id.* at 262.

the ADA to have disabilities, effectively stripping numerous people with disabilities of their legally protected status.[172] Burgdorf also points out that the Supreme Court has, in the past, referred to disability accommodations as a "preference" granted to individuals with disabilities—an advantage over others rather than a right.[173] Although the ADA was amended in 2008 to prohibit the consideration of mitigating measures as in these 1999 cases,[174] the conflict between the Supreme Court and Congress again illustrates the constant tension between the concept of deservingness and the ADA's goal of preventing discrimination against people with disabilities.

3. Defensive Policies Toward "Fake Service Animals"

Returning to the issue of fraudulent and abusive requests for accommodation, the widespread use of "fake service animals" has led various states to impose laws criminalizing service animal fraud,[175] a defensive measure in line with the suspicion surrounding disability accommodations.[176] Likewise, in response to alleged widespread fraud in registering pets as emotional support animals,[177] the United States Department of Justice ("DOJ") has effectively imposed a blanket ban on emotional support animals, ordering that public accommodations are never required to accommodate emotional support animals.[178] In doing so, the DOJ excludes emotional support animals from the definition of service animals,[179] suggesting that emotional support is not a legally necessary, deserving, or protectable service.[180] Implicitly, this rule assumes that enough requests for accommodation in the form of bringing registered emotional support animals into stores, housing complexes, or other locations of public accommodation will be fraudulent to warrant their exclusion.[181] As a result, the rule ignores the fact that some individuals with disabilities would benefit from being able to use emotional support animals in public spaces or even require emotional support animals to function in public settings and, therefore, be integrated into them.[182]

Notably, the DOJ's approach to—or rather, disregard of—emotional support animals is not based on empirical evidence of service animal fraud

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[172] *Id.*

[173] *Id.* at 298.

[174] *See* 42 U.S.C.S. § 12101 note to decision 48 (LexisNexis 2020) (Consideration of corrective or mitigative measures).

[175] Sabal Palm Condos. of Pine Island Ridge Ass'n v. Fischer, 2014 U.S. Dist. LEXIS 32705, at *5 (S.D. Fla. 2014); *see also* Hurley v. Loma Linda. Univ. Med. Ctr., 2014 U.S. Dist. LEXIS 18018, at *25–26 (C.D. Cal. 2014).

[176] *See* Dorfman, *supra* note 7, at 559.

[177] Generally, "service animals" include guide dogs and hearing dogs, and they perform roles that are considered legally necessary. Jake Butwin, *Emotional Support Animals Are More Than Just Pets: It Is Time for the Department of Justice to Align Its Emotional Support Animals Policies with Other Anti-Discrimination Laws*, 47 FORDHAM URB. L.J. 195, 198–99 (2019). Emotional support animals provide comfort and increase their owners' emotional wellbeing and, thus, are considered by some disability rights advocates and individuals with disabilities to be necessary. *Id.*

[178] *Id.* at 199.

[179] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34521 (June 17, 2008) (to be codified at 28 C.F.R. pt. 36).

[180] *See* Butwin, *supra* note 177, at 220.

[181] *Id.* at 199–200.

[182] *See id.* at 220.

but instead on hypothetical instances of fraud.[183] Whereas Dorfman argued that Disney Parks was more motivated by vague notions of deservingness than by concrete evidence of GAC abuse to reject A.L.'s requested accommodations,[184] the DOJ arguably takes an even more defensive approach by explicitly disallowing the use of emotional support animals by individuals with conditions that would not fall under the protection of the ADA.[185] The DOJ acknowledges that some individuals use emotional service animals legitimately and sympathetically describes this fraud as mistaken rather than duplicitous, but it still does not designate them as deserving of disability accommodations.[186] Further, it cites the "trend" of fraudulently and abusively using exotic species and untrained animals as a justification for its blanket ban.[187] Rhetorically, it uses these extreme cases comparably to *HuffPost*'s or Disney Parks's mentions of "the 'tour guides' scandal,"[188] in that it alludes to the most egregious and widely discussed instances of fraud in order to invoke a broader sense of deservingness. Thus, even though it has legitimate concerns with fraud, the DOJ justifies its exclusion of all emotional support animals—including those used both with intent to defraud public accommodations and those used mistakenly or otherwise in good faith—by drawing attention to the risk of requests for accommodation by those who are not deserving of accommodation.

4. Defensive Policies Toward Frivolous ADA Litigation

It might be reasonable to take for granted that an individual who knowingly requests disability accommodation fraudulently is probably not deserving of accommodation. However, according to the academics above, a problem arises when the reasonableness of Title III accommodations is determined by a measure of deservingness rather than by a measure of need.[189] Further, some academics argue that fraud may not be a product of individual malice, but of the shortcomings of the ADA.[190] Specifically, ADA fraud occurs not only in places of public accommodation, but also in the courts. This fraud takes the form of vexatious litigation, serial litigation, and otherwise frivolous litigation targeting public accommodations for a variety of reasons, including enforcement of the provisions of Title III[191] and, less altruistically, collection of attorney's fees.[192] To deter non-meritorious litigation, Title III limits remedies to injunctive relief, excluding monetary damages for successful plaintiffs.[193] Nevertheless, vexatious litigation and serial litigation persist.

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[183] *Id.* at 221; *see also* Nondiscrimination on the Basis of Disability by Public Accomodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34515–16.

[184] Dorfman, *supra* note 7, at 603.

[185] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. at 34515–16.

[186] *Id.*

[187] *Id.* at 34516.

[188] A.L. v. Walt Disney Parks & Resorts US, Inc., 469 F. Supp. 3d 1280, 1293 (M.D. Fla. June 22, 2020); Belkin, *supra* note 3; Dorfman, *supra* note 7, at 603.

[189] *See, e.g.*, Burgdorf, *supra* note 166, at 265.

[190] Hull, *supra* note 21, at 71; Becker, *supra* note 21, at 97.

[191] Becker, *supra* note 21, at 97–98.

[192] *See* Colker, *supra* note 18, at 390.

[193] 42 U.S.C.S. § 12188(a)(2) (LexisNexis 2020); *see also* Colker, *supra* note 18, at 378.

For example, the American Disability Institute, a nonprofit organization in Philadelphia, helps clients with disabilities sue public accommodations en masse for alleged Title III violations.[194] In 2004, it set out to sue five thousand public accommodations with the purported goal of ensuring that every business in Philadelphia complied with the ADA.[195] While this intention, on the surface, is noble and could have benefitted Philadelphia-area individuals with disabilities by enforcing the ADA, the volume of cases would also have generated a large sum of attorney's fees.[196] Accordingly, serial litigants are often viewed as greedy and frivolous,[197] especially when they target small businesses that are vulnerable to the financial burden of ADA litigation.[198] This tension also affects these cases' outcomes, as courts are compelled to weigh serial litigants' bad faith against the legitimacy of the accommodations that they request on behalf of claimants with disabilities.[199]

In general, courts will view vexatious litigants negatively, and vexatious litigants will be less likely to receive accommodation if they are found to sue public accommodations frivolously, repeatedly, and maliciously.[200] Once again, it is reasonable to deter bad-faith litigation that burdens the courts,[201] but the purpose of deterring fraud also prevents other people with disabilities from receiving the accommodations that they might need. Just as Disney Parks's efforts to deter fraud by implementing the DAS might have prevented A.L. and other guests with disabilities from fully enjoying Disney Parks's services, the fraudulent motivations behind vexatious ADA litigation might prevent a variety of otherwise legitimate and necessary accommodations from being implemented.

Accordingly, Helia Hull, Associate Professor of Law at Barry University argues that current policies regarding vexatious litigation work against the goals of the ADA and, therefore, should be amended to provide people with disabilities sufficient accommodation as the ADA intends.[202] Hull specifically advocates a requirement that potential litigants notify businesses of their alleged discrimination so that, if necessary, the business may make any alterations required by the ADA.[203] In turn, public accommodations and businesses can avoid costly litigation, and their patrons with disabilities can receive the accommodations that they need to enjoy their services fully.[204] Nevertheless, just as the DOJ's efforts to thwart the use of fake service animals can likewise prevent the use of legitimate emotional support animals,[205] the courts' balancing of litigants' potentially vexatious

[194] Becker, *supra* note 21, at 97; *see also* Walter Olson, *The ADA Shakedown Racket*, CITY J. (Winter 2004).
[195] Becker, *supra* note 21, at 97–98.
[196] *Id.* at 98.
[197] *Id.* at 100 (discussing a California serial litigant).
[198] Hull, *supra* note 21, at 71.
[199] *See* Becker, *supra* note 21, at 104.
[200] *See, e.g.*, *id.*
[201] *See, e.g.*, *id.* at 105.
[202] Hull, *supra* note 21, at 99.
[203] *Id.*
[204] *Id.*
[205] *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34515–16 (June 17, 2008) (to be codified at 28 C.F.R. pt. 36).

motivations against the need for their requested accommodations can impede the good-faith accommodation of other individuals with disabilities.

Further, both the DOJ's treatment of emotional support animals and courts' treatment of vexatious Title III litigants depend on definitions of fraud imposed, respectively, by the DOJ and by the courts themselves. As explained above, in effectively banning emotional support animals, the DOJ suggests that providing emotional support is not a service.[206] Thus, the question of whether a person using an emotional support animal deserves accommodation answers itself: because emotional support animals might be used illegitimately, the use of emotional support animals is illegitimate. The courts' treatment of serial litigants and vexatious litigants operates similarly: because frivolous litigants request accommodations unnecessarily, their requested accommodations are unnecessary. As a result, in both cases, predetermined designations of deservingness affect the success of legal challenges to those designations. Arguably, both the DOJ and the courts use perceived trends in Title III fraud to perpetuate broad definitions of fraud that encompass potentially good-faith and necessary requests for accommodation by people with disabilities. Hence, while there are genuine cases of fraud, it is unclear whether they occur at a rate that, under the ADA, justifies broad refusals to accommodate people with disabilities.

5. Weighing Business Concerns Against the Need for Accommodation

The tension between the concepts of deservingness and antidiscrimination is arguably one of two key factors informing defensive ADA policies, the second being business efficiency. Specifically, in addition to the cost of ADA litigation, public accommodations incur costs in implementing changes to accommodate people with disabilities. While Title III typically accounts for these costs through the undue burden defense,[207] a court still may not find a great cost to be unduly burdensome or, alternatively, to constitute a fundamental alteration. As a result, some see the ADA as being somewhat at odds with business interests. For instance, shortly after the implementation of the ADA, West Virginia attorney Sandra Law cautioned that courts would need to exercise discretion in applying the undue burden defense by taking into account the different sizes of businesses and the types of services they offered.[208] While she did not refer explicitly to the fundamental alteration defense, she illustrated its underlying logic by noting that simple, inexpensive accommodations could have catastrophic effects on businesses and that an undue burden could be created not only by the cost or magnitude of a change, but also by the type of change.[209] For example, she explained that requiring a nightclub to turn on its lights so that a person with visual impairments could participate in the nightclub's activities would create an undue burden by driving away the nightclub's typical patrons who

[206] *Id.*

[207] 42 U.S.C.S. § 12182(b)(2)(A)(iii) (LexisNexis 2020); *see also* 28 C.F.R. § 36.104.

[208] Sandra K. Law, *The Americans with Disabilities Act of 1990: Burden on Business or Dignity for the Disabled?*, 30 DUQ. L. REV. 99, 111–13 (1991). This prescient suggestion is now reflected in the CFR's proposed undue burden factors. 28 C.F.R. § 36.104.

[209] *See* Law, *supra* note 208, at 113.

reasonably expect a nightclub to be darkly lit.[210] Thus, even an intuitive, easy, or inexpensive accommodation such as turning on lights can be unreasonable from a business perspective.

However, in *A.L.*, the Florida Middle District Court was not concerned that the DAS or GAC itself was unduly burdensome in the sense of an operational encumbrance, but that the results of the fraudulent use of a system such as the GAC would be excessively costly.[211] In fact, once again, the issue of cost arose with respect not to undue burden but to fundamental alteration.[212] As such, the court's reasoning in *A.L.* seems to mirror the logic of Law's arguments about the undue burden defense. Law suggested that fundamental changes to public accommodations' business models are an extension of the undue burden defense;[213] in contrast, the court in *A.L.* used the magnitude of the burden of fraud to find a fundamental alteration to Disney Parks's business.[214] In either case, the undue burden defense and the fundamental alteration defense overlap in application and imply, per Law's arguments, that the interests of people with disabilities and of businesses work against each other.

In the case of the DAS, some Disney Parks guests with disabilities have found that the movement from the GAC to DAS constituted a downgrade or reduction in disability accommodations.[215] For instance, political scientist and Disney Parks frequenter Kevin Mintz believes that the Florida Middle District Court's application of the fundamental alteration defense in the A.L. case raises ethical questions regarding equal access.[216] Specifically, Mintz asserts that, by identifying queuing as a fundamental feature of the experience of visiting a theme park, the court invoked fairness, suggesting that equal access means that guests with disabilities would wait to experience theme parks' attractions just like guests without disabilities.[217] In theory, Mintz says, this expectation is an application of "simple equality," or the belief that the law should treat everyone the same way.[218] In practice, however, there are features of the DAS that create inequalities between theme park guests.[219] For example, DAS-eligible guests might sometimes, in fact, have to wait longer to board an attraction than guests not receiving accommodations, thus putting them at a disadvantage compared to guests who do not have disabilities or who are not eligible to use the DAS.[220] As a result, the application of simple equality, which assumes that guests with disabilities are not deserving of perceived special treatment over other

[210] *See id.*
[211] A.L. v. Walt Disney Parks & Resorts US, Inc., 469 F. Supp. 3d 1280, 1293 (M.D. Fla. June 22, 2020).
[212] *Id.*
[213] Law, *supra* note 208, at 113.
[214] *A.L.*, 469 F. Supp. 3d at 1293.
[215] *See, e.g.*, Kevin Mintz, *Is Disney Disabling?*, 33 DISABILITY & SOC'Y 1366, 1368 (2018).
[216] *Id.*
[217] *Id.*
[218] *Id.* (citing MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (Basic Books 1983)).
[219] *Id.*
[220] *Id.*; *see also Services for Guests with Disabilities*, *supra* note 73.

guests, does not capture real-life complications that can still prevent them from fully enjoying public accommodations.[221]

However, Mintz does not take into account that the *A.L.* court's finding that queuing is an essential factor of Disney Parks's business model also depended on a finding that there was a substantial risk of queuing-related fraud under the GAC system.[222] Following the court's reasoning, the widespread abuse of the GAC by guests who were not in need of accommodation spurred its replacement,[223] so a possible conclusion of Mintz's and A.L.'s perception that the DAS is an inferior accommodation to the GAC is that GAC fraud, as opposed to moral panic or public relations alone, caused Disney Parks to reduce its accommodations for guests with disabilities. More broadly, this series of events suggests that, just as frivolous and vexatious Title III litigation can disadvantage good-faith claimants,[224] fraudulent requests for accommodation by individuals without disabilities can, in turn, disadvantage people with disabilities. Even more generally, regardless of their motivation, defensive policies against Title III fraud that are meant to balance business interests with the rights of people with disabilities might ultimately work against the integrationist purpose of the ADA.

VI. CONCLUSION, REMAINING QUESTIONS, AND A POTENTIAL SOLUTION

As of today, the doctrinal, ethical, and policy questions raised by the A.L. case are still open. While the *A.L.* decision stands for the proposition that ADA fraud necessitates defensive policies,[225] these policies materially disadvantage individuals with disabilities, potentially leading them to be excluded from public activities.[226] Further, the *A.L.* decision raises the question of whether it is appropriate for courts to consider the risk of ADA fraud at all, especially when doing so balances or, rather, works against the interests of claimants with disabilities by weighing against accommodation. By incorporating the risk of fraud into Title III through the fundamental alteration defense, courts also may invoke, intentionally or unintentionally, morals of deservingness and other societal prejudices against people with disabilities.

Doctrinally, the A.L. case suggests that an expansive application of the fundamental alteration defense encompasses not only multiple Title III principles but also an array of social prejudices towards people with disabilities. The conceptual overlap between undue burden and fundamental alteration has led courts to raise undue burden concerns under the fundamental alteration defense, arguably transforming fundamental alteration into a catch-all test of economic risks, operational encumbrances, and marketing needs. As such, the fundamental alteration defense implicates

[221] Mintz, *supra* note 215.
[222] A.L. v. Walt Disney Parks & Resorts US, Inc., 469 F. Supp. 3d 1280, 1293 (M.D. Fla. June 22, 2020).
[223] *Id.*
[224] *See, e.g.*, Becker, *supra* note 21, at 104.
[225] *A.L.*, 469 F. Supp. 3d at 1293.
[226] *See e.g.*, Dorfman, *supra* note 7, at 603.

social preconceptions of how individuals with disabilities interface with businesses, services, and public benefits. Further, underlying issues, such as economic scarcity and operational inefficiency, cause consumers to compete with each other for goods and services or, more generally, advantages and benefits.

These issues exacerbate the effects of concepts such as deservingness, so the role of the ADA is not only to materially improve the lives of people with disabilities but also to shape social norms and beliefs surrounding disability. While the A.L. case is unusual in that it explicitly accounts for the risk of ADA fraud as a factor weighing against reasonable accommodation, it represents a broader spread of defensive practices. This trend suggests that valid business concerns such as efficiency, cost, and public perception might be at odds with fully accommodating individuals with disabilities; it is true, after all, that adopting defensive practices can both disadvantage people with disabilities and allow public accommodations to operate more efficiently, cut costs, and preserve their public image against accusations of lacking moral rigor and allowing Title III fraud and abuse to proceed unchecked. As a result, absent legislative intervention, there is a risk that courts will increasingly treat antidiscrimination and business interests as diametrically opposed, perpetuating the logic that drove discriminatory policies such as the Ugly Laws.

PGA Tour, a definitive case involving the fundamental alteration defense, demonstrates this risk. Specifically, it might be concerning that the Supreme Court considered the possibility that professional golfers would fraudulently request disability accommodations to gain advantages over each other because it signals that even the highest court in the United States could be susceptible to the same paranoia and moral panic that some believe motivate defensive practices. While *PGA Tour* laid the groundwork for a valid incorporation of fraud into Title III, *A.L.* illustrates the full deployment of the risk of ADA abuse as a defense not only against business inefficiencies, but also against the needs of individuals with disabilities themselves. As such, it endorses an approach to Title III that places the interests of people with disabilities in opposition to the interests of public accommodations and, by extension, the general public. In effect, the act of legally balancing these interests against each other and implying that they are at odds with each other creates a model of disability litigation that eerily echoes the longstanding exclusion of individuals with disabilities from the public eye.

All organizations that are responsible for the protection both of the rights of people with disabilities and the interests of businesses—Congress, the courts, and public accommodations—may also bear the burden of preventing ADA fraud, including non-meritorious litigation, because it disadvantages not only legitimate claimants but also public accommodations. Some varieties of this abuse, such as the fraudulent use of emotional support animals, may be regarded as frivolous and inconvenient, while others, such as non-meritorious ADA litigation, can cause measurable economic harm. Still, ADA fraud works against the interests of people with disabilities, fostering suspicion and leading to defensive policies that make public accommodations less convenient, and even less accessible, to individuals

with disabilities. Consequently, courts may still need to weigh the risk of this fraud against the risk of discrimination against and exclusion of people with disabilities.

However, hypervigilance regarding fraud risks further stigmatizes disability, especially invisible disabilities. Thus, the highly risky incorporation of fraud into the fundamental alteration defense may be a problem not of inadequate incentives (and deterrents) but of a lack of support both for individuals with disabilities and for public accommodations. If both Americans with disabilities and the businesses that they patronize—particularly small businesses that are more susceptible to the economic burdens and operational encumbrances of ADA fraud—receive sufficient government support in the form of accommodations and financial assistance, respectively, then their interests may no longer diverge in the courts. In turn, the broader public will be less likely to view disability through the lens of competition, which will lessen the negative impacts of concepts such as deservingness and redirect focus from relative worthiness to individual need. Therefore, if the courts continue to adopt defensive policies and public accommodations resist implementing reasonable accommodations due to financial and operational difficulties, then it may be necessary for Congress to amend the ADA to heal the perceived rift between disability rights and economic efficiency and, in turn, build a positive, integrative relationship between people with disabilities and public accommodations and, by extension, the public at large.