State-Funded Discrimination: Section 504 of the Rehabilitation Act and its Uneven Application to Independent Contractors and Other Workers

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Kim was a medical records clerk and receptionist for a small doctor's office in Oklahoma. Fred was a doctor, small business owner, and Kim's employer. In 1984, Kim was diagnosed with cancer and over the following years she sought treatment for her disease, which included undergoing a number of surgeries. After a surgery in 1998, Kim was unable to resume her employment at Fred's practice for several months. Despite this lapse in time, Fred often assured her that her job was safe. Yet, when Kim felt healthy enough to return to work, Fred refused to let her do so because of her condition.

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1. J.D. Candidate, May 2012, The Catholic University of America, Columbus School of Law; B.A. Public Policy, Hispanic Studies, 2006, The College of William and Mary. First, the author would like to thank Professor Elaine Gardner for her invaluable expertise in the field of disability law and her guidance in the development of this Comment. Next, the author would like to thank the editors and staffers of the Catholic University Law Review for the countless hours they spent editing and tracking down sources. Finally, the author would like to thank his family and friends for their love and support, especially Julya, who was always willing to give constructive criticism.
   1. Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 969–70 (10th Cir. 2002).
   2. Id.
   3. Id. at 970.
   4. Id.
   5. Id.
   6. Id.
Title I of the Americans with Disabilities Act of 1990 (ADA) explicitly prohibits an employer from discharging an employee on the basis of a medical condition, such as cancer. Nevertheless, Fred’s brash refusal to rehire Kim did not violate Title I’s prohibition because, under the statute, an “employer” is an individual who employs fifteen or more people—a threshold that Fred’s business did not meet. Thus, Fred’s business did not qualify as a covered entity under the statute and fell outside the scope of Title I.

Undeterred, Kim hired an attorney to represent her in an

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7. 42 U.S.C. §§ 12111–12117 (2006). The stated purpose of the ADA of 1990 is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Id. § 12101(b)(1). Title I prohibits disability-based discrimination by employers. Id § 12112(a). Title II prohibits such discrimination by public entities and public transportation. Id. § 12132. However, some courts have held that Title II does not cover employment. See, e.g., Zimmerman v. Or. Dep’t of Justice, 170 F.3d 1169, 1178 (9th Cir. 1999) (“[T]he ADA’s linkage of Title I and the Rehabilitation Act establishes that Congress thought that the ADA’s employment-related provisions were embodied in Title I, not Title II. Congress made this linkage even stronger in 1992 when it amended the Rehabilitation Act to incorporate employment-related standards from Title I, not Title II . . . .”). Title III prohibits disability-related discrimination by places of public accommodation and commercial facilities. Id. § 12182(a). Title IV requires telecommunications companies to provide functionally equivalent telephone services to those suffering from hearing or speech impairments. 47 U.S.C. § 225(b)(1) (2006). Despite the statutory protection afforded those with disabilities as well as prohibitions against discriminating based on other protected attributes, namely race and gender, the general rule is still that an employee works at the will of his employer. See, e.g., Criscione v. Sears, Roebuck & Co., 384 N.E.2d 91, 95 (Ill. App. Ct. 1978) (“[A]n employment at will relationship can be terminated for ‘a good reason, a bad reason, or no reason at all.’” (quoting Loucks v. Star City Glass Co., 551 F.2d 745, 747 (7th Cir. 1977))). The United States is the only industrialized nation that uses the employment-at-will doctrine. RUTH O’BRIEN, CRIPPLED JUSTICE 3-4 (2001) (discussing the problems of workplace hierarchies and their impact on the disabled).

8. 42 U.S.C. § 12112(a) (Supp. Ill 2009) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees . . . .”); 42 U.S.C. § 12102(1)(A) (Supp. Ill 2009) (defining disability as “a physical or mental impairment that substantially limits one or more major life activities”); Id. § 12102(2)(B) (including “normal cell growth” as a “major life activity”). Because cancer affects normal cell growth, it falls within the scope of disabilities covered by the ADA. TABER’S CYCLOPEDIC MEDICAL DICTIONARY 323 (Donald Venes et al. eds., 20th ed. 2005) (defining cancer as “[m]alignant neoplasia marked by the uncontrolled growth of cells”).

9. 42 U.S.C. § 12111(5)(A) (2006) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . .”); see also Schrader, 296 F.3d at 974 (indicating that the fifteen or more employees threshold balances the conflicting goals of eliminating discrimination, while not burdening small businesses with the costs of litigating potential claims).

10. See Schrader, 296 F.3d at 969 (accepting the district court’s finding that Fred’s business had fewer than fifteen employees).
employment-discrimination suit.\(^{11}\) Although Kim’s claim fell outside the ADA’s scope, thus foreclosing any relief under that statute, Kim’s attorney discovered an alternate claim under section 504 of the Rehabilitation Act.\(^{12}\) This provision of law prohibits discrimination based on disability by entities receiving federal funding.\(^{13}\) Because Fred accepted federal funds through Medicare and Medicaid, Kim was able to file her claim under section 504.\(^{14}\) Ultimately, Kim received a favorable decision from the Tenth Circuit Court of Appeals.\(^{15}\) The Tenth Circuit remanded the case to the district court, but the parties settled before the case could be tried on the merits.\(^{16}\)

Other courts, however, have required that in addition to the fifteen-employee threshold, an employer-employee relationship must exist for the antidiscrimination protections of the Rehabilitation Act to apply, thus leaving independent contractors\(^{17}\) outside the scope of section 504.\(^{18}\) These courts

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12. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2006)); OKLA. BAR ASS’N, supra note 11. Although the Rehabilitation Act incorporates ADA standards, the Tenth Circuit concluded that the Act does not retain the same definition of “employer” and remanded the case to the trial court to further determine whether there was discrimination by a federally-funded entity under these facts. Schrader, 296 F.3d at 969–70.

13. Rehabilitation Act § 504. Although brief in its public law form, section 504 explicitly prohibited disability-based discrimination by any program or activity receiving federal funding. Id.

14. OKLA. BAR ASS’N, supra note 11. In the Civil Rights Restoration Act of 1987, Congress provided an expansive definition of what “program or activity” qualifies as an entity receiving federal funding. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, sec. 4, § 504, 102 Stat. 28, 29 (codified as amended at 29 U.S.C. § 794 (2006)); S. REP. NO. 100-64, at 4 (1987), reprinted in 1988 U.S.C.C.A.N. 3, 6 (“The Civil Rights Restoration Act of 1987 amends [section 504 of the Rehabilitation Act of 1973] by adding a section defining the phrase ‘program or activity’ and ‘program’ to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance.”). Congress intended for the Civil Rights Restoration Act to rectify the misinterpretation of section 504 and similar statutes by the Supreme Court in several decisions that “unduly narrowed or cast doubt upon [section 504’s] broad application.” Civil Rights Restoration Act §2 (codified as amended at 20 U.S.C. § 1677 (2006)). For example, the Civil Rights Restoration Act superseded the Supreme Court’s decision in Grove City College v. Bell, which had limited Title IX protection against gender discrimination under the Education Amendments of 1972 to the specific programs or recipients of federal funding, rather than to the institution as a whole. Civil Rights Restoration Act, sec. 3, § 908; Grove City Coll. v. Bell, 465 U.S. 555, 573–74 (1984) (holding that the grant of federal aid to some students does not subject the entire university to Title IX), superseded by statute, Civil Rights Restoration Act of 1987, sec. 3, § 908; see also S. REP. NO. 100-64, at 4.

15. OKLA. BAR ASS’N, supra note 11.

16. Id.

17. An independent contractor is “[o]ne who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.” BLACK’S LAW DICTIONARY 783 (8th ed. 2004).
supported their decisions by relying on subsection (d) of section 504, which incorporates the standards applied under Title I of the ADA. This Comment addresses the scope of section 504, particularly analyzing the language of subsection (d), in two distinct but doctrinally related types of cases: (1) those in which the court is asked whether the number of employees is material to a section 504 claim; and (2) those in which the court is asked whether an independent contractor may bring a claim under section 504.

On the eve of the ADA’s twentieth anniversary in 2010, the United States Supreme Court declined to review a case from the Ninth Circuit Court of Appeals that had extended section 504 protection to independent contractors. Since that time, the incorporation provision in section 504(d) has continued to engender confusion, causing a current split among the circuit courts.

The Rehabilitation Act, signed into law in 1973, became the first major federal statute to protect the rights of persons with disabilities. Congress intended for the Act to provide a private right of action to disabled individuals experiencing discrimination in federally-funded programs.

18. See, e.g., Wojewski v. Rapid City Reg’l Hosp., Inc., 450 F.3d 338, 345 (8th Cir. 2006) (holding that the plaintiff had no cause of action under the Rehabilitation Act due to his status as an independent contractor, which does not equate to an “employee”); Hiler v. Brown, 177 F.3d 542, 547 (6th Cir. 1999) (finding that the plaintiff’s action could not be brought under the Rehabilitation Act because the plaintiff’s supervisors did not meet the statutory definition of an “employer”).


20. Subsection (d) resolves the broad issue of whether to wholly or selectively incorporate Title I into section 504. See Fleming v. Yuma Reg’l Med. Ctr., 587 F.3d 938, 946 (9th Cir. 2009), cert denied, 130 S. Ct. 3468 (2010). This Comment, however, focuses on a narrower issue in order to gain greater insight into the intended coverage of these two discrete situations.


22. Fleming, 587 F.3d at 938.


25. A disabled person is defined generally as an individual “incapacitated by illness or injury,” or “physically or mentally impaired in a way that substantially limits activity.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 355 (11th ed. 2003). Title I of the ADA utilizes a similar definition of disability, which includes “a physical or mental impairment that substantially limits one or more major life activities of such individual.” 42 U.S.C. § 12102(1)(A) (Supp. III 2009). Expanding on the dictionary definition, the ADA delineates...
Although section 504 expressly covers “any program or activity,” no language in the Rehabilitation Act mentions or limits its application to a specific employment relationship.27

The ADA extended these proscriptions beyond entities receiving federal funds.28 In this regard, Title I seemingly enlarges the scope of discrimination

“major life activities” as including, but not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” Id. § 12102(2)(A). The ADA also considers major life activities to include “major bodily functions,” which encompass “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” Id. § 12102(2)(B). The Rehabilitation Act provides that “[e]xcept as otherwise provided in subparagraph (B), the term ‘individual with a disability’ means any individual who—(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services.” 29 U.S.C. § 705(20)(A) (2006). Subsection (B) further states that the definition of disability also includes any person considered disabled under the ADA’s statutory definition. Id. § 705(20)(B) (Supp. III 2009); Michael Borella, Food Allergies in Public Schools: Toward a Model Code, 85 CHI.-KENT L. REV. 761, 767 (2010) (indicating that the ADA and the Rehabilitation Act use substantially similar language in defining who constitutes a disabled person under each statute).


26. Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 971 (10th Cir. 2002) (citing Niehaus v. Kan. Bar Ass’n, 793 F.2d 1159, 1162 (10th Cir. 1986)). An express purpose of the Rehabilitation Act was to “promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.” Darrone, 465 U.S. at 626 (quoting Rehabilitation Act of 1973 § 2(8)).

27. 29 U.S.C. § 794(b) (2006). This section explicitly references the following entities as qualifying as a “program or activity”: departments, agencies and other instrumentalities of a state; colleges and universities; corporations, partnerships and sole proprietorships; and any organization created through combination of the above entities. Id. The brief, original language of the public law establishing section 504 fails to mention specific entities, but, nevertheless, still clearly applies section 504 to “any program or activity.” Rehabilitation Act of 1973, § 504 (“No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”).

28. See 42 U.S.C. § 12101(b) (2006) (stating that the ADA intended to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and not including any limitation to federally-funded programs); Id. § 12111(2) (providing that the entities covered under Title I of the ADA are “employer[s], employment agency[ies], labor organization[sh], and joint labor-management committee[s],” without any reference to a federal-funding requirement); see also Schrader, 296 F.3d at 974 (“Unlike the blanket involuntary coverage of the ADA, however, the Rehabilitation Act’s coverage extends only to entities that choose to receive federal assistance.”).
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protection. However, Title I specifically contemplates application to only the employment relationship.\textsuperscript{29} Subsequent to the passage of the ADA, Congress amended the Rehabilitation Act in 1992, adding section 504(d).\textsuperscript{30} This section incorporates standards from Title I of the ADA to aid in determining when a violation of section 504 has occurred.\textsuperscript{31}

Recent case law illustrates how the courts have struggled in interpreting the incorporation provision of section 504(d).\textsuperscript{32} In 1999, the Sixth Circuit indicated in \textit{Hiler v. Brown} that suits brought under the Rehabilitation Act incorporated the ADA’s statutory definition of “employer.”\textsuperscript{33} In 2002, the Tenth Circuit reached a contrary conclusion in \textit{Schrader v. Fred A. Ray, M.D., P.C.} holding, instead, that section 504(d) did not incorporate Title I’s requirement of “15 or more employees”\textsuperscript{34} into the Rehabilitation Act.\textsuperscript{35} This split deepened in 2006 when the Eighth Circuit, in \textit{Wojewski v. Rapid City Regional Hospital, Inc.}, found the similarities between the ADA and the Rehabilitation Act to preclude the extension of coverage of section 504 to a group not covered by Title I.\textsuperscript{36} In 2009, the Ninth Circuit evened the split in \textit{Fleming v. Yuma Regional Medical Center}, analyzing the language in the two statutes and concluding that Congress intended that they serve two separate functions.\textsuperscript{37}

The ADA specifically contemplates the employer-employee relationship, while the Rehabilitation Act paints with a much broader brush, focusing on “otherwise qualified” individuals in “any program or activity.”\textsuperscript{38} Some courts have concluded that Congress intended this distinction because, while the Rehabilitation Act covers a more expansive group of workers, their right of action is limited to discriminatory behavior by programs receiving federal

\begin{footnotes}
\textsuperscript{29} See 42 U.S.C. § 12112(a) (Supp. III 2009) (prohibiting discrimination under Title I within the confines of the “terms, conditions, and privileges of employment”); \textit{Fleming}, 587 F.3d at 942 (noting that Title I’s scope is limited to cover only employment relationships).
\textsuperscript{31} See 29 U.S.C. § 794(d); \textit{Schrader}, 296 F.3d at 971 (citing 29 U.S.C. § 794(d)).
\textsuperscript{32} See infra, notes 33–37 and accompanying text (discussing how various circuit courts have issued contradictory holdings on the issue).
\textsuperscript{33} \textit{Hiler v. Brown}, 177 F.3d 542, 547 (6th Cir. 1999) (“[T]his Court finds that Hiler cannot sue his supervisors under . . . the Rehabilitation Act since his supervisors do not meet the statutory definition of an ‘employer.’” (citations omitted)). Under the ADA, an employer is one who employs at least fifteen employees. 42 U.S.C. § 12111(5)(A).
\textsuperscript{34} 42 U.S.C. § 12111(5)(A).
\textsuperscript{35} \textit{Schrader}, 296 F.3d at 975.
\textsuperscript{36} \textit{Wojewski v. Rapid City Reg’l Hosp., Inc.}, 450 F.3d 338, 345 (8th Cir. 2006) (holding that an independent contractor cannot invoke the protections of the Rehabilitation Act).
\textsuperscript{37} \textit{Fleming v. Yuma Reg’l Med. Ctr.}, 587 F.3d 938, 945 (9th Cir. 2009) (asserting that the broad language of the Rehabilitation Act applies to all types of workers, including independent contractors), \textit{cert. denied}, 130 S. Ct. 3468 (2010).
\textsuperscript{38} \textit{Id.} at 941–42.
\end{footnotes}
funds.\textsuperscript{39} Although this issue has resulted in opposing holdings by the federal circuits, the Supreme Court continues to avoid resolving the conflict.\textsuperscript{40}

Part I of this Comment discusses the history behind Congress's enactment of the ADA and the Rehabilitation Act. Part I also provides insight into the pertinent statutory provisions of these Acts and related regulations, particularly section 504 of the Rehabilitation Act and Title I of the ADA. Part II explores the basis for the current circuit split, with a focus on the varying rationales used by the courts. Part III addresses the shortfalls in the Sixth and Eighth Circuits' interpretation of the scope of the Rehabilitation Act. Part III then analyzes these shortfalls with regard to (1) the plain language of the statute, (2) the interior coherence of the statutory scheme, (3) the legislative history, and (4) supportive case law, ultimately finding that the Ninth and Tenth Circuits were thorough in supporting their conclusions. Part III then presents the compelling political and social need for protection of the disabled as well as increased protection of nonemployees affected by disability, particularly independent contractors. Finally, this Comment concludes that the Supreme Court should adopt the approaches advocated by the Ninth and Tenth Circuits, providing a bright-line rule that unequivocally protects all workers under section 504 of the Rehabilitation Act.

I. THE ENACTMENT AND ENFORCEMENT OF DISABILITY LAWS

A. The Rehabilitation Act

1. Background and Adoption of the Act in 1973

The history of the Rehabilitation Act can be traced back to the Vocational Rehabilitation Act,\textsuperscript{41} a post-World War I statute "mandat[ing] vocational rehabilitation programs for disabled veterans."\textsuperscript{42} In 1920, the Smith-Fess Act\textsuperscript{43} extended these protections to civilians,\textsuperscript{44} and sought to "offer[] limited services

\textsuperscript{39} See, e.g., Schrader, 296 F.3d at 974 (noting that "the balance between prohibiting discrimination and protecting small entities" is nevertheless struck in the Rehabilitation Act despite its broad scope).


\textsuperscript{41} Vocational Rehabilitation Act, ch. 107, 40 Stat. 617, 617 (1918) ("[This] Act . . . provide[s] for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces.").


\textsuperscript{44} See id.; H.R. REP. NO. 93-244, at 3 (1973). Joseph Shapiro explains that the disabled began organizing advocacy groups toward the end of the nineteenth century, culminating in the
These services and programs strove to rehabilitate, train, and ultimately find work placement for disabled people who, in the general consciousness, would be a burden on many employers. Congress implemented the first amendments to the Smith-Fess Act after World War II, increasing the scope of vocational rehabilitation programs to include mentally handicapped individuals. The Amendments expanded coverage beyond the limited services of training, counseling, and placement through the addition of statutory language to include “any services necessary to render a disabled individual fit to engage in a remunerative occupation.” This early history illustrates how these initial programs fixated on rehabilitating disabled persons, without focusing on their right to be free from discrimination.

Society’s perspective regarding the relationship between the disabled and the workplace began to change during the 1970s. The Civil Rights Act of 1964 seemingly provided a perfect model for a new rights-based approach to employment discrimination against the disabled; however, as enacted, the Act applied only to “race, color, religion, sex, [and] national origin.” Opposition to an extension of civil rights protection to cover the disabled was so strong that proposals made in the early 1970s to amend the Civil Rights Act to include disabled persons failed. In fact, even when section 504 of the Rehabilitation Act of 1973 was introduced, Congress did not intend for the provision to institute rights for disabled people. In a 1972 House report, the Committee on Education and Labor defined the Rehabilitation Act without any

enactment of several state statutes in the 1920s and 1930s. JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 63 (1993).

See O’BRIEN, supra note 7, at 4–5 (indicating that disabled people were seen as a threat to workplace hierarchy and they needed to overcome their disabilities in order to enter the workforce).

Id. at 3.

Id. (quoting the Vocational Rehabilitation Act Amendments of 1943, Pub. L. No. 78-113, 69 Stat. 652 (1943) (internal quotation marks omitted) (repealed 1973)).

O’BRIEN, supra note 7, at 6–7 (describing how the rehabilitation centers had the ultimate goal of achieving normalcy, seeking to “make . . . people fit in with society”). Professor Chai R. Feldblum characterized this phenomenon as the “medical model” of disability, as opposed to the prior prevailing “exclusionary model” of earlier years. Feldblum, supra note 42, at 95–96. The medical model was predicated on integration requiring a change in the disabled person rather than changing the societal aspects that further impeded the disabled person’s ability to function in that society. Id. at 96.

O’BRIEN, supra note 7, at 107.


O’BRIEN, supra note 7, at 114.

Id. at 112.
emphasize on rights. Some scholars have even commented that from the early
days of vocational rehabilitation, the Rehabilitation Act developed an
“antirights emphasis” that persisted into the 1970s. Nevertheless, after its
passage in 1973, the Rehabilitation Act ultimately became a civil rights statute
protecting and promoting persons with disabilities, and preventing
discrimination in programs receiving federal funding. Although the Act’s
broad language and limited legislative history create interpretation problems
regarding Congress’s intent, determining the scope of section 504 has proven
to be particularly troublesome in the courts.

Provision in Section 504(d)

Several circuit courts have recently decided a number of cases that required
interpreting the following language from section 504(d) of the Rehabilitation
Act: “The standards used to determine whether this section has been violated
in a complaint alleging employment discrimination under this section shall be
the standards applied under title I of the Americans with Disabilities Act of
1990 . . . .” Congress added subsection (d) through section 506 of the
Rehabilitation Act Amendments of 1992, which was enacted “to revise and
extend the program of the Rehabilitation Act of 1973.” Nearly twenty years
of “judicial experimentation” with the unfamiliar Act and its limited legislative

55. See H.R. REP. NO. 93-244, at 1–2 (1973) (characterizing the Rehabilitation Act as
implementing “a combination of services provided as needed to physically or mentally
handicapped persons to prepare them for employment and productive, useful living”).

protection for disabled persons in federal government positions); 29 U.S.C. § 793 (mandating
affirmative action in regards to federal contracts in excess of $10,000); id. § 794 (precluding
discrimination in any program or activity receiving federal funds); id. § 794a (providing remedies
for violations of § 791 and § 794 of this Act comparable to those available under the Civil Rights
Act of 1964); see also Jeffrey O. Cooper, Comment, Overcoming Barriers to Employment: The
Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities
Act, 139 U. PA. L. REV. 1423, 1424 (1991) (illustrating the protections provided by the
Rehabilitation Act). This change from an antirights focus to a civil rights focus was
groundbreaking because Congress finally acknowledged that societal prejudices were the cause
of the lesser status given to disabled Americans. W.S. Miller, Ganden v. NCAA: How the
NCAA’s Efforts to Clean Up Its Image Have Created an Ethical and Legal Dilemma, 7 MARQ.

57. See, e.g., Fleming v. Yuma Reg’l Med. Ctr., 587 F.3d 938, 940–42 (9th Cir. 2009)
discussing section 504 and finding that the Rehabilitation Act has a broader scope than the
ADA), cert denied, 130 S. Ct. 3468 (2010); Wojewski v. Rapid City Reg’l Hosp., Inc., 450 F.3d
338, 345 (5th Cir. 2006) (noting the similarities between the two statutes and finding it was
Congress’s intent that they have a similar scope); see also Cooper, supra note 57, at 1424
explaining that although most provisions of the Rehabilitation Act are somewhat vague, section
504’s open-ended nature has created significant interpretational issues).


history necessitated the amendment. Although the incorporation of Title I kept the body of disability law consistent for the immediate future, the circuit courts have struggled with the breadth of this incorporation.

B. Title I of the Americans with Disabilities Act

Congress passed the ADA in 1990 to provide comprehensive civil rights coverage to the disabled community. The Act was considered a "humanitarian law" that "transcended partisan lines." Title I prohibits discrimination against a qualified individual on the basis of disability in any

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63. Compare Fleming, 587 F.3d at 939 (holding that the incorporation of Title I into the Rehabilitation Act is selective), and Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 975 (10th Cir. 2002) (supporting selective incorporation), with Wojewski, 450 F.3d at 345 (holding that the similarities indicated that Section 504(d) was intended to broadly incorporate Title I), and Hiler v. Brown, 177 F.3d 542, 547 (6th Cir. 1999) (holding that Title I's definition of employer was incorporated into the Rehabilitation Act).

64. 135 CONG. REC. 19,812 (1989) (statement of Sen. Cranston) (indicating that the ADA's enactment "would build on 16 years of successful experience with section 504 to eliminate disability discrimination in the private sector and all levels of units of Government"); see also Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Comm. on Labor & Human Res., and the Subcomm. on the Handicapped, 101st Cong. 195 (1989) (statement of Richard L. Thornburgh, Att'y Gen. of the United States) ("It is exciting for me to be a part of the process which, this year, will pass legislation that will extend the Nation's civil rights guarantees to the disabled community."). A look at international disability law uncovers two basic approaches to disability rights. Katharina Heyer, From Special Needs to Equal Rights: Japanese Disability Law, 1 ASIAN-PAC. L. & POL'Y J. 7:1, 7:2 (2000). The ADA, as well as disability rights laws in Canada, Great Britain, Australia, and New Zealand, follow the first approach, which bans discrimination in order to provide equal opportunities for disabled citizens. Id. at 7:2–7:3. The second approach "aims for equality of results by emphasizing special needs over equal rights[,] and mandating quotas." Id. at 7:3. This approach, adopted by Japan and many countries in Europe, aims to provide the disabled with greater employment opportunities. Id. While the ADA approach mandates "blind justice," the European and Japanese approach cherishes differences. Id. For an interesting discussion of disability law among the former Soviet-bloc nations, see Oliver Lewis, Mental Disability Law in Central and Eastern Europe: Paper, Practice, Promise, 8 J. MENTAL HEALTH L. 293 (2002).

65. O'BRIEN, supra note 7, at 162.
stage of the employment process. To further illuminate this protection, Title I expounds the employment relationship. An employee is defined as "an individual employed by an employer." This nondefinition lacks sufficient clarity to guide any sort of legal analysis. Fortunately, Title I more specifically defines an "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees."

C. An Examination of the Federal Regulations Implementing the
Rehabilitation Act

The regulations enacted by major administrative agencies provide essential insight into the implementation of the Rehabilitation Act’s statutory scheme, particularly section 504. Exemplifying the general trend, Department of Justice (DOJ) regulations mirror the broad scope of the Rehabilitation Act by utilizing the same language—"any program or activity"—regarding coverage. However, limitations on coverage can be found in DOJ regulations, such as the stipulation that "[a] recipient [of federal funding] that employs fifteen or more persons shall provide appropriate auxiliary aids to qualified handicapped persons." This section suggests that recipients with less than fifteen employees are not required to provide auxiliary aids; thus,

66. See 42 U.S.C. § 12112(a) (2006) (prohibiting discrimination with regard to “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment”).
67. Id. § 12111(4)-(5).
68. Id. § 12111(4).
70. 42 U.S.C. § 12111(5). Congress chose to exempt entities with fewer than fifteen employees in order to insulate small businesses from some of the potentially expensive mandates of Title I. See 135 CONG. REC. 19,835 (1989) (statement of Sen. Hatch) (“The purpose . . . is to help small small [sic] businesses, because this bill is going to be very expensive.”). Senator Hatch noted further, “there is absolutely no consideration given to small small [sic] businesses similarly situated with regard to the public accommodations aspect.” Id. at 19836. Consequently, a small store would be free to discriminate when it hires a clerk, but it would be forced to abide by the ADA in service to its customers. Id. As a solution, Senator Hatch recommended tax credits for small businesses that abide by these public accommodations mandates. Id.
71. See, e.g., 24 C.F.R. § 8.1–2 (2010) (implementing Rehabilitation Act provisions to the Department of Housing and Urban Development); 28 C.F.R. §§ 42.501–.502 (2010) (applying the Rehabilitation Act to organizations within the Department of Justice); 34 C.F.R. § 104.1–2 (2010) (implementing the Rehabilitation Act to the Department of Education); 45 C.F.R. § 84.1–2 (2010) (providing Rehabilitation Act regulations to the Department of Health and Human Services). These regulations are an essential component of the Rehabilitation Act’s history because section 504 in its initial form was quite brief and did not provide any guidance as to the implementation of its mandates. See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87. Stat. 355; see also supra note 61.
72. 28 C.F.R. § 42.503(a).
73. Id. § 42.503(f).
certain persons with disabilities will be unable to participate in these programs or activities. The rationale behind such tolerance for discrimination in this limited context is explained by the final sentence of the section, which states "[d]epartment officials may require recipients employing fewer than fifteen persons to provide auxiliary aids when this would not significantly impair the ability of the recipient to provide its benefits or services." The DOJ attempted to avoid burdening smaller providers with onerous requirements that potentially could prevent those providers from offering their benefits or services to anyone. The DOJ regulations do not utilize the terms "employer" or "employee"; rather, the DOJ frames the regulations in terms of "recipients" of federal financial assistance and "qualified handicapped persons," with no personnel threshold for qualification as a recipient. Thus, such explicit exceptions for small providers in certain instances indicate that general enforcement is not limited to employers with fewer than fifteen employees. This leaves the expansive definition of "program or activity" as the only factor limiting application of the regulation to employment discrimination against qualified handicapped persons.

74. See id.
75. Id.
76. See id. (limiting the requirement of providing auxiliary aids to apply only to employers of fifteen or more employees); id. § 42.505(c)(2) (imposing temporary recordkeeping and disclosure requirements only on those recipients who employ fifty or more people and receive at least $25,000 from the DOJ); id. § 42.521(c) (exempting providers with less than fifteen employees from making significant structural alterations in order to comply with accessibility requirements).
77. See id. §§ 42.540(e), 42.540(k)–(l). A "qualified handicapped person" is one who, "with reasonable accommodation, can perform the essential functions of the job in question." Id. § 42.540(e)(1).
78. Id. § 42.540(h).
79. Id. § 43.510(a)(1).
II. A CIRCUIT SPLIT OVER THE INTERPRETATION OF SECTION 504

A. The Sixth and Eighth Circuits Incorporate the Definition of Employer from Title I into Section 504

The Sixth Circuit tangentially addressed incorporation in *Hiler v. Brown*. Although *Hiler* concerned supervisor liability under the Rehabilitation Act, the court’s finding, which equated Title I and the Rehabilitation Act in employment cases, makes it relevant to this Comment. The Sixth Circuit held that the Rehabilitation Act’s antiretaliation provision only allows a complainant to bring a cause of action against an employer. The court noted that while the Rehabilitation Act had no specific statutory definition of employer, there was a general understanding that the definition remains consistent across all of the civil rights statutes as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person.” A supervisor in his individual capacity does not

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80. *Hiler v. Brown*, 177 F.3d 542, 545–46 (6th Cir. 1999). Hiler was a Vietnam veteran who suffered serious injuries during his service, which resulted in neurological impairment. *Id.* at 543. He worked as a pipefitter at the Veterans Administration, located in Lexington, Kentucky and performed his duties competently despite his disability. *Id.* His disability rendered him unable to perform well on written exercises under time constraints. *Id.* Hiler’s supervisors refused to accommodate his disability by modifying the written test used in the management selection process. *Id.* Hiler scored poorly on the test and did not receive a recommendation for a promotion to management. *Id.* at 544. Subsequently, he brought an action for discrimination and retaliation against his supervisor. *Id.* The United States District for the Eastern District of Kentucky found that the action for discrimination could be brought only against the head of the Veterans Administration, but that the action for retaliation could be brought appropriately against his supervisors in their individual capacities. *Id.* The defendants then raised an interlocutory appeal on the narrow issue of whether suit under the Rehabilitation Act’s antiretaliation provision is proper against a supervisor. *Id.* at 544–45. The Sixth Circuit reversed, holding that such a cause of action is improper. *Id.* at 547.

81. See supra note 20 and accompanying text.

82. *Hiler*, 177 F.3d at 545 n.5 (“The ADA, ADEA, and the Rehabilitation Act borrowed the definition of ‘employer’ from Title VII [of the Civil Rights Act of 1964].” (citation omitted)). The opinion discussed the employment provision of Title VII but did not mention Title I or the incorporation provision of section 504(d). *Id.* at 545. Instead, the court considered whether Hiler had a remedy against his supervisor. *Id.* at 544–47. Thus, the court focused on the section 504 provisions that explicitly provide the remedies available under Title VII. See id.; see also § 794a(a)(1) (2006).

83. *Hiler*, 177 F.3d at 547.

84. *Id.* at 545 & n.5 (quoting 42 U.S.C. § 2000e(b) (1994)) (internal quotation marks omitted); e.g., 29 U.S.C. § 630(b) (2006) (defining employer under the Age Discrimination in Employment Act as “a person engaged in an industry affecting commerce who has twenty or more employees”); 42 U.S.C. §§ 12111(5)(A), 12112(a) (2006) (providing the ADA definition of employer in Title I); see also Williams v. Banning, 72 F.3d 552, 553–54 (7th Cir. 1995) (equating the definitions of employer across a number of civil rights statutes). The phrase “affecting commerce” indicates that these civil rights statutes were passed under federal Commerce Clause power; in contrast, the Rehabilitation Act was passed under Congress’s Spending Clause power.
qualify as an employer or an agent under this definition; thus, in *Hiler*, the complainant could not bring a suit against the defendants because they were the complainant’s supervisors, rather than his employer.\(^{85}\)

In *Wojewski v. Rapid City Regional Hospital, Inc.*, the defendant hospital revoked Dr. Paul Wojewski’s medical staff privileges after he exhibited behavior symptomatic of his diagnosed bipolar disorder.\(^{86}\) The Eighth Circuit held that Dr. Wojewski, as an independent contractor, was neither protected under section 504, nor under Title I.\(^{87}\) Citing Eighth Circuit precedent, the court provided a three-part test to determine whether the plaintiff was entitled to recover under section 504.\(^{88}\) This test required a plaintiff to show: “(1) he is a qualified individual with a disability; (2) he was denied the benefits of a program or activity of a public entity which receives federal funds; and (3) he

\(^{85}\) See James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-discrimination Mandate of the Americans with Disabilities Act*, 52 Ala. L. Rev. 91, 185–86 (2000) (noting that the Commerce Clause basis for the ADA is eroding, and that the voluntary acceptance of Spending Power conditions underlying section 504 lacks the strength of Commerce Power-based, mandatory provisions); see *infra* notes 124–27 and accompanying text.

\(^{86}\) *Wojewski* v. Rapid City Reg’l Hosp., Inc., 450 F.3d 338, 340–41 (8th Cir. 2006). As a member of the medical staff at Rapid City Regional Hospital, Dr. Wojewski had a full staff, including access to the assistance of hospital employees and use of the hospital’s facilities. *Id.* However, he was classified as an independent contractor because he billed and received payments directly from the patients. *Id.* at 341. In addition, he did not receive a W-2 form from the hospital, did not receive employment benefits, and covered his own Social Security taxes. *Id.* Prior to bringing his suit, Dr. Wojewski took a leave of absence for treatment of his bipolar disorder, and after returning he “experienced an acute [manic] episode while performing open-heart surgery.” *Id.* Concerned for patient safety, the hospital terminated his medical staff privileges, preventing him from practicing at the hospital. *Id.*

\(^{87}\) *Id.* at 341–42.

\(^{88}\) *Id.* at 344 (citing Gorman v. Bartch, 152 F.3d 907, 911 (8th Cir. 1998), rev’d on other grounds *sub nom.* Barnes v. Gorman, 536 U.S. 181 (2002)). The court reached the section 504 issue only first after addressing the plaintiff’s Title I claim. *Id.* at 342–43. Wojewski argued that he was covered under Title I as an employee of the hospital “due to (1) the economic reality of his circumstances (i.e., that he was completely dependant [sic] upon [the hospital] for his livelihood); and (2) the heightened level of control and authority that [the hospital] exercised over him.” *Id.* at 342. The court found the ADA definition of employee, “an individual employed by an employer,” to be circular and unhelpful in distinguishing between an employee and an independent contractor. *Id.* (quoting 42 U.S.C. § 12111(4) (2006)) (internal quotation marks omitted). The court instead made the determination by examining the factors supplied by the Second Restatement of Agency, as the United States Supreme Court had instructed. *See id.* at 342–43 (citing Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989)); RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (listing factors that largely relate to the employer’s “right to control” the means by which the work is done, rather than just the end result). Finding that he did not meet the requirements of an employee, the court treated Dr. Wojewski as an independent contractor. *Wojewski*, 450 F.3d at 342–44.
was discriminated against based on his disability."89 The court focused primarily on the first prong of the test—whether or not Dr. Wojewski was a qualified individual with a disability.90 Although the lower court had ruled that satisfying the first prong required employee status, the Eighth Circuit avoided accepting or rejecting this conclusion.91 Instead, the Eighth Circuit ultimately rested its holding on the determination that Title I and section 504 are substantially similar and, at times, interchangeable because "[t]he ADA requires an employee-employer relationship and the Rehabilitation Act contemplates the same."92 Thus, as an independent contractor, Dr. Wojewski’s section 504 claim failed.93

B. The Ninth and Tenth Circuits Distinguish Title I and Section 504

1. The Tenth Circuit Holds that the Number of Employees Is Immaterial to a Suit Under Section 504

The Tenth Circuit concluded that section 504(d) does not incorporate the Title I definition of "employer" in a 2002 case, Schrader v. Fred A. Ray, M.D., P.C.94 Dr. Fred Ray employed Kim Schrader as a medical clerk and receptionist until she was diagnosed with a brain tumor, whereupon Dr. Ray terminated her employment.95 Schrader brought a claim under section 504 and Dr. Ray challenged, asserting that he had fewer than fifteen employees and, thus, did not qualify as an employer under Title I or section 504.96

a. Title I Is Relevant for Substantively Determining Whether Discrimination Under Section 504 Has Occurred

The Schrader court was persuaded by the language of section 504(d), which explicitly incorporates the substantive standards from Title I of the ADA "to determine whether [the Rehabilitation Act] has been violated,"97 and, notably,

89. Wojewski, 450 F.3d at 344 (quoting Gorman, 152 F.3d at 911) (internal quotation marks omitted).
90. Id. at 344–45 (quoting 29 U.S.C. § 794(a) (2006)).
91. Id. at 345. The court found that Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987), did not control because the plaintiff in the case was unquestionably an employee, and thus the decision did not hinge on the determination of whether the first prong required employee status. See Wojewski, 450 F.3d at 345.
92. Id.
93. Id.
94. Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 969 (10th Cir. 2002).
95. Id. at 970; see also supra text accompanying notes 1–15 (providing factual background).
96. Schrader had a history of illness, including diagnoses of kidney cancer in 1984 and a brain tumor in 1997. Id. Her employment terminated after an extended absence from work to undergo kidney surgery, despite Dr. Ray's assurances that her job was safe. Id.
97. 29 U.S.C. § 794(d) (2006); see also McDonald v. Pa. Dep't of Pub. Welfare, Polk Ctr., 62 F.3d 92, 95 (3d Cir. 1995) (indicating that "the substantive standards for determining liability
makes no mention of incorporating Title I when determining "whether an employer is even subject to the Rehabilitation Act in the first instance."\textsuperscript{98} The Tenth Circuit determined that the plain language of section 504(a) clearly covers "any program or activity,"\textsuperscript{99} and is not limited to the employer-employee relationship.\textsuperscript{100}

Like the Eighth Circuit in \textit{Wojewski}, the Tenth Circuit provided its own test for determining if a violation of section 504 has occurred.\textsuperscript{101} A plaintiff must show: "(1) [he] is handicapped under the Act; (2) he is ‘otherwise qualified’ to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminates against plaintiff."\textsuperscript{102} The Eighth Circuit’s characterization of the prima facie case requirements under section 504 differs from that in \textit{Wojewski}, particularly concerning the meaning of “qualified individuals.”\textsuperscript{103} While the \textit{Wojewski} court cited the direct language from section 504(a) in the first prong of its test,\textsuperscript{104} the Tenth Circuit in \textit{Schrader} clarified that language to avoid any confusion as to the meaning of an “otherwise qualified individual,” and interpreted the intent of the statute to cover those individuals who are “‘otherwise qualified’ to participate in the program.”\textsuperscript{105}

\textbf{b. Finding the Number of Employees To Be Immaterial as a General Rule Is Essential for Coherence Within the Statutory Scheme of Section 504}

The Tenth Circuit also analyzed section 504(c) in response to claims that the Rehabilitation Act was not designed to protect workers outside of the


\textit{Schrader}, 976 F.3d at 976.

\textit{Id.} at 971 (quoting \textit{Powers v. MJB Acquisition Corp.}, 184 F.3d 1147, 1151 (10th Cir. 1999)).

\textit{Id.} (quoting \textit{Powers}, 184 F.3d at 1151).


\textit{Wojewski}, 450 F.3d at 344 (citing 29 U.S.C. § 794(a)).

\textit{Schrader}, 296 F.3d at 971 (quoting \textit{Powers}, 189 F.3d at 1151). In fact, Title I defines qualified individual as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires,” with no mention of other statutory qualifications. See 42 U.S.C. § 12111(8) (Supp. III 2009).
employer-employee relationship as defined by Title 1. The court focused on the purpose of section 504(c) to protect small providers from undertaking cost-prohibitive structural alterations when attempting to accommodate persons with disabilities. Regulations enforcing this subsection define a small provider as a recipient of federal funds who has fewer than fifteen employees. Consequently, the court in Schrader determined that the section 504(c) exemption from making significant structural alterations for small providers would be superfluous if the incorporation provision of section 504(d) was held to incorporate the “fifteen or more employee” definition from Title I into section 504 as a whole.

c. Legislative History and Congressional Intent Show that Title I and Section 504 Are Separate and Distinct

Upon reviewing the legislative history of the 1992 amendment that created section 504(d), the Tenth Circuit held that it was Congress’s intent to clarify “the definitions of reasonable accommodations and discrimination” while maintaining the broad coverage of section 504 over “any individual who wants to work.” Nothing in the legislative history indicates that Congress intended to place limitations on section 504 in any way, or, specifically, that it intended to limit worker recovery to those within the Title I definition of an employment relationship.

106. Schrader, 296 F.3d at 972–73. Section 504(c) provides the following: “Small providers are not required . . . to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available.” 29 U.S.C. § 794(c).

107. Schrader, 296 F.3d at 972–73 (citing 29 U.S.C. § 794(c)).

108. See id. at 973; e.g., 7 C.F.R. § 15b.18(c) (2010); see also 28 C.F.R. § 42.521(c) (2010); 41 C.F.R. § 101-8.309(d) (2010) (each providing that “[i]f a recipient with fewer than fifteen employees finds, after consultation with a handicapped person seeking its services, that there is no method of complying with [the accessibility requirement] other than by making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible at no additional cost to the handicapped person”).

109. Schrader, 296 F.3d at 973.

110. Id. at 974 (quoting 138 CONG. REC. 31,523 (1992) (statement of Sen. Harkin)).


112. Id. at 974. Incorporating portions of Title I into section 504 served a number of essential purposes for Congress, such as solidifying the ADA’s national mandate, clarifying judicial interpretation of the two separate but related statutes, and increasing the breadth of the Rehabilitation Act. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (“An Act to revise and extend the programs of the Rehabilitation Act of 1973 . . . .”); S. REP. NO. 102-357, at 2, reprinted in 1992 U.S.C.C.A.N. 3712, 3713 (addressing the desire to conform the “precepts and values” of both statutes, which included the ADA’s national mandate to eliminate disability discrimination); cf. Cooper, supra note 61, at 1223–24 (illustrating the serious problems that resulted from diverging judicial interpretations of Rehabilitation Act mandates). Interpretation of the 1992 amendments in a manner that would limit the otherwise
In challenging the characterization of the two statutes as having similar coverage, the court highlighted the *quid pro quo* relationship inherent in the Rehabilitation Act, but not found in Title I. The court acknowledged that Title I balances the goals of eliminating discrimination and avoiding undue cost burdens by precluding small businesses—those with less than fifteen employees—from liability. The court further observed that aside from businesses with fewer than fifteen employees, no organization can avoid compliance with the mandating strictures of Title I; however, any entity can avoid Rehabilitation Act liability if it chooses not to receive federal funding.

In effect, federal funding is provided in exchange for an agreement by the recipient to abide by the Rehabilitation Act’s stricter prohibition of discrimination.

2. The Ninth Circuit Follows the Tenth Circuit in Applying Section 504 to Independent Contractors

In *Fleming v. Yuma Regional Medical Center*, the Ninth Circuit went a step further than the Tenth Circuit had in *Schrader* by holding that the Rehabilitation Act is applicable outside of the traditional employer-employee relationship. While *Schrader* applied section 504 protection to employment outside of the Title I definition of an employer-employee relationship, the Ninth Circuit concluded that section 504 also extends to cover an independent contractor suing for discrimination.

broad coverage of section 504 would be entirely contrary to the clear legislative intent surrounding the passage of the ADA and the 1992 amendments to the Rehabilitation Act.


114. *Id.* (citing Butler v. City of Prairie Vill., 172 F.3d 736, 744 (10th Cir. 1999)). Congress was convinced that abiding by the demands of Title I would be quite expensive for many organizations and prohibitively so for small providers. See supra note 70. Independent contractors were not protected either, giving small businesses even more freedom to avoid the harsh mandates of Title I. See Wojewski v. Rapid City Reg’l Hosp., Inc., 450 F.3d 338, 342 (8th Cir. 2006).

115. *Schrader*, 296 F.3d at 974. The mandatory nature of Title I and the voluntary nature of the Rehabilitation Act result from their varied constitutional underpinnings, leading to this discrepancy in scope. See supra note 82; see infra notes 124–27.


118. *Schrader*, 296 F.3d at 975.

119. *Fleming*, 587 F.3d at 939. Dr. Fleming, an anesthesiologist suffering from sickle cell anemia, applied for a position with the defendant, Yuma Regional Medical Center (Yuma). *Id.* at 940. After becoming aware of Dr. Fleming’s health condition, Yuma indicated that they would be unable to make particular accommodations for him, which resulted in Dr. Fleming declining the offer and suing for employment discrimination. *Id.* The district court determined that Dr. Fleming was an independent contractor. *Id.*
a. Once the Initial Determination of Federal Funding Is Made, Section 504 Covers a Much Broader Range of People and Entities than Title I

The Ninth Circuit began its analysis by comparing the scope of section 504 against that of Title I. Section 504 broadly covers any "otherwise qualified individual" in any "program or activity." Additionally, section 504 broadly defines "program or activity" as "all of the operations of state instrumentalities, colleges and universities, local education agencies, and an entire corporation, partnership, or other private organization, or an entire sole proprietorship." On the other hand, Title I more narrowly covers only the "aspects of the employer-employee relationship." The Ninth Circuit explained the differing scopes of the two statutes by providing a constitutional rationale, indicating that the ADA was passed under Congress's Commerce Clause power, while the Rehabilitation Act was passed under the Spending Clause power.

120. Id. at 941-42.
121. 29 U.S.C. § 794(a) (2006); Fleming, 587 F.3d at 941-42 (noting also that the Rehabilitation Act's scope is broader than the ADA's scope); see supra note 14 (indicating that Congress intended this language to be broad when it superseded the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984), superseded by statute, Civil Rights Restoration Act of 1987, sec. 3, § 908, 102 Stat. 28, 28 (codified as amended at 20 U.S.C. § 1687 (2006)).
122. Fleming, 587 F.3d at 942 (quoting 29 U.S.C. § 794(b)); see also Sharer v. Oregon, 581 F.3d 1176, 1178 (9th Cir. 2009) (noting Congress's intent to broaden the definition); Haybarger v. Lawrence Cnty. Adult Prob. & Parole, 551 F.3d 193, 200 (3d Cir. 2008) (acknowledging the Third Circuit's shift toward broad interpretation).
123. Fleming, 587 F.3d at 942 (citing Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1172, 1177-78 (9th Cir. 1999)).
124. U.S. CONST. art. I, § 8, cl. 3; see 42 U.S.C. § 12101(b)(4) (indicating that one purpose of the ADA was to "invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities"); 42 U.S.C. § 12111(5) (2006) (defining an employer under the ADA as one who works in an industry affecting commerce); United States v. Miss. Dep't of Pub. Safety, 321 F.3d 495, 500 (5th Cir. 2003) ("[T]he ADA is an exercise of Commerce Clause power.").
125. U.S. CONST. art. I, § 8, cl. 1; see 29 U.S.C. § 794(a) (providing coverage over all programs and activities receiving federal assistance); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 491 (4th Cir. 2005) ("Like Title VI of the Civil Rights Act and Title IX of the Education Amendments, § 504 of the Rehabilitation Act 'invokes Congress' power under the Spending Clause ... to place conditions on the grant of federal funds.'" (quoting Barnes v. Gorman, 536 U.S. 181, 185-86 (2002) (internal citation omitted)).
126. Fleming, 587 F.3d at 941 n.3.
b. Incorporation that Would Limit the Scope of Section 504 Requires Explicit Language

Next in its analysis, the Ninth Circuit addressed the incorporation provision in section 504(d). Because section 504(d) only mentions using the “standards” of Title I and does not explicitly incorporate Title I, the Ninth Circuit found the Supreme Court’s decision in Consolidated Rail Corporation v. Darrone to be instructive. In Darrone, the Court held that, although section 505 of the Rehabilitation Act referenced Title VI of the Civil Rights Act of 1964 as providing “remedies, procedures, and rights” for those covered under section 504, this incorporation did not mean that all other Title VI limitations were incorporated into a section 504 claim as well. The lack of any specific incorporation of language from Title VI convinced the Supreme Court that Congress did not intend to include the limitations from Title VI in the Rehabilitation Act.

Similarly, the Ninth Circuit in Fleming also found support in its own precedent: in Zimmerman v. Oregon Department of Justice, the court had addressed whether a reference to section 505 in Title II of the ADA incorporated the Rehabilitation Act into the ADA. The court held that Title II neither expressly nor impliedly incorporates the Rehabilitation Act’s


128. Id. at 942-43 (citing Darrone, 465 U.S. at 632). Darrone addressed a suit by a train conductor who was fired after losing his left hand and forearm. Darrone, 465 U.S. at 628. After his accident, the company fired him without first making a determination that he was unfit to work. Darrone’s defense relied on the argument that the incorporation of Title VI of the Civil Rights Act into section 505’s provision of remedies available under section 504 renders other provisions from Title VI incorporated as well. Id. at 631–32. In particular, the corporation argued that section 604 of Title VI should be incorporated into section 504 of the Rehabilitation Act, thereby limiting the scope of coverage to “employment practice[s] . . . where a primary objective of the Federal financial assistance is to provide employment.” Id. at 631 (alterations in original) (quoting Civil Rights Act of 1964, Pub. L. No. 88-352 §, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000d-3 (1982))).


130. See Darrone, 465 U.S. at 631–33.

131. Id. at 632–33.

132. Fleming, 587 F.3d at 943 (9th Cir. 2009) (citing Zimmerman v. Or. Dep’t of Justice, 170 F.3d 1169, 1179 (1999)). In Zimmerman, the plaintiff argued that Title II of the ADA had incorporated section 505 of the Rehabilitation Act, and thus Title II applied to employment discrimination. Zimmerman, 170 F.3d at 1179. Similar to Darrone, the appellee argued for incorporation as following from the enumeration of remedies in Title II as the “remedies, procedures, and rights set forth in section 794a of Title 29 [the Rehabilitation Act].” Id. (alteration in original) (quoting 42 U.S.C. § 12133 (1994)). The court disagreed, concluding that section 505 is neither explicitly nor implicitly incorporated into Title II as a result of this language. Id. at 1179–80.

133. Zimmerman, 170 F.3d at 1179.
“substantive employment provisions.” In Fleming, fearing that total incorporation would narrow the scope of the Rehabilitation Act prohibitively, the Ninth Circuit expanded on Zimmerman, stating that the mandate of section 504 “naturally encompasses the entire operation of the program or activity, for its federal funding may well flow into compensation for employees,” and we would add, for independent contractors as well.135 Thus, the Ninth and Tenth Circuits have avoided limiting the scope of the statutory scheme without clear congressional intent.136

c. Congress Never Intended for the Rehabilitation Act Amendments of 1992 to Limit the Scope of Section 504

The Ninth Circuit directly addressed its concern that, should the rationale of the Sixth and Eighth Circuits prevail, the adoption of subsection (d) would have limited the scope of section 504 as a whole—a result that Congress would not likely have intended.137 Statutory interpretation must be done deliberately, and the court “must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.”138 Citing the Tenth Circuit in Schrader, the court distinguished between applying the substantive standards of Title I, which section 504 incorporates, and determining who is actually covered by section 504, which does not involve a Title I analysis.139 Responding to Yuma's argument that the circuit court was bound by the Supreme Court's recent holding that the fifteen-employee rule is substantive in Arbaugh v. Y & H Corp.,140 the Ninth Circuit found the case inapposite because the issue of whether the definition of employer is a “substantive ingredient” of the Act, rather than a jurisdictional element, has no bearing on determining whether that definition is involved in the Act's substantive, rather than procedural, standards.141 In Arbaugh, the Supreme Court held that the definition of employer was substantive rather than

134. Id. at 1180.
135. Fleming, 587 F.3d at 943 (quoting Zimmerman, 170 F.3d at 1181).
136. See Darrone, 465 U.S. at 633–35 (indicating that the Supreme Court has been wary regarding the incorporation of provisions limiting the scope of a statute without express or implied congressional intent).
137. Fleming, 587 F.3d at 943 ("Without additional direction from Congress, we are hesitant to reduce the express scope of the Rehabilitation Act by wholesale adoption of definitions from another act." (citing Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009))).
139. Fleming, 587 F.3d at 944 (quoting Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 972 (10th Cir. 2002)).
140. Arbaugh v. Y & H Corp., 546 U.S. 500, 504 (2006) (finding that a fifteen or more employee requirement was substantive, for determining whether an employer was subject to suit under Title VII, as opposed to jurisdictional).
141. Fleming, 587 F.3d at 944–45. The court illustrates the point in an aphoristic footnote: “As a simple example, one must recognize when seeking directions that right rather than left doesn’t necessarily also mean right rather than wrong.” Id. at 945 n.5.
jurisdictional for the purpose of establishing subject-matter jurisdiction over the claim.142 The Ninth Circuit did not face this distinction in Fleming, where the issue was “whether the ADA’s definition of employer is part of the ADA’s substantive standard for determining when discrimination occurs.”143

d. The Total Incorporation of Title I Would Result in Statutory Inconsistency

The Ninth Circuit went on to address the need for consistency within the statutory scheme of section 504, and held that total incorporation would create a number of inconsistencies between section 504 and provisions incorporated from Title I.144 For example, the court indicated that section 504 and Title I each independently have provisions related to alcoholism and infectious disease.145 Total incorporation requires that either Title I provisions displace section 504 provisions on the same subject matter, or section 504 claims meet the standards of both statutory schemes.146 While admittedly not comparing all attributes of the two statutes, the Ninth Circuit found that Congress clearly intended to create “two parallel schemes” with differing scope and application.147

e. The Plain Language of the Rehabilitation Act Is Broad Enough to Cover Independent Contractors

The Ninth Circuit, challenging the argument by the Sixth and Eighth Circuits that selective incorporation would impermissibly extend the scope of section 504, held that the plain language is broad enough to include independent contractors.148 The court concluded by acknowledging the Sixth and Eighth Circuit’s strongest argument—that the plain language of section 504(d), directly referring to Title I “as such sections relate to employment,”149 indicates Congress’s intent to incorporate the meaning of employment from Title I into section 504.150 While recognizing the plausibility of this argument,

142. Id. at 944 (citing Arbaugh, 546 U.S. at 503–04). In Arbaugh, Justice Ruth B. Ginsburg framed the issue before the Court as “whether the numerical qualification contained in Title VII’s definition of ‘employer’ affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief.” Arbaugh, 546 U.S. at 503.

143. See Fleming, 587 F.3d at 945.

144. Id.


146. Fleming, 587 F.3d at 945.

147. Id.

148. Id.


150. Fleming, 587 F.3d at 946.
the Ninth Circuit ultimately dismissed the reasoning as an interpretation based inappropriately on judicial expedience rather than the best reading of the Act as a whole. Consistent with its analysis, the Ninth Circuit held that Mr. Fleming could properly bring a claim against the medical center under section 504 even though he was admittedly not an employee.

III. RESOLUTION OF THE CIRCUIT SPLIT

A. The Sixth and Eighth Circuits Incorporated the ADA's "Employer" into the Rehabilitation Act with Little Supporting Law

1. The Sixth Circuit Inappropriately Expanded the Scope of Incorporation to Include a Restrictive Definition of "Employer"

In holding that an employee could not bring his anti-retaliation action against his supervisors, the Sixth Circuit drew a logical, but perhaps overreaching, conclusion that "individuals who do not otherwise meet the [Title VII] definition of 'employer' cannot be held liable under the Rehabilitation Act's antiretaliation provision." The Sixth Circuit noted that the "remedies, procedures, and rights" available to a federal employee under the Rehabilitation Act are enumerated in Title VII of the Civil Rights Act of 1964. The court then quoted Title VII, which permits actions against an "employer, employment agency, labor organization, or joint labor-management committee," when discussing the remedies available for retaliation under the Rehabilitation Act. After analyzing the incorporation of this provision into the Rehabilitation Act, the court concluded that an individual cannot be held liable for retaliation under the Act if that individual falls outside the scope of Title VII's definition of "employer." However, this conclusion was improperly drawn considering that Title VII actually provides for causes of action against more than just "an employer," as noted above. Because the issue in Hiler was whether supervisors could be held personally liable for retaliation under the Rehabilitation Act, the court could have resolved the case on narrower grounds by finding that these particular supervisors did not fall into the broader category set forth in Title

151. Id. ("[O]ur own administrative convenience is not a factor in determining what Congress meant . . . .").

152. Id.


154. Id. at 545 (quoting 29 U.S.C. § 794a(a)(1) (1999)).

155. Id. (quoting 42 U.S.C. § 2000e-5(b) (1999)).

156. Id. at 545–46. Titles I and VII of the ADA utilize identical definitions of the term, providing that an employer is "a person engaged in an industry affecting commerce who as [fifteen] or more employees . . . ." Compare 42 U.S.C. § 2000e(b) (2006), with id. §12111(5)(A).

157. See 42 U.S.C. § 2000e–5(b) (permitting causes of action against "an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs").
Nevertheless, the Sixth Circuit held that permissible defendants must fall under the stringent statutory definition of "employer," a conclusion which, in consideration of the scope of this case, was unwarranted because "employer" represents only a portion of the broader category provided by Title VII.159

The Sixth Circuit never truly addressed the issue of whether section 504 incorporates the statutory definition of employer from Title I and other civil rights statutes, but rather assumed it as fact.160 The court rebuffed the plaintiff's claim by highlighting the distinction between employing entities and individual supervisors, finding that civil rights statutes only intend to assign liability to the former.162 The court reasoned that Title VII did not contemplate supervisor liability because supervisors lacked the appropriate authority to satisfy the remedies originally made available under the Title, which include reinstatement and back-pay.163 However, this rationale does not explain why an employer who has less than fifteen employees or hires only independent contractors is free from liability, while an employer with sixteen employees and no independent contractors may be held liable to all of his workers.164 The ease with which the Sixth Circuit disposed of Hiler was indicative of the simplicity of the issue presented as framed by the court.165 The question of

158. See Hiler, 177 F.3d at 543.
159. Id. at 547.
160. Cf. Trop v. Dulles, 356 U.S. 86, 119–20 (1958) (Frankfurter, J., dissenting) (prescribing that the Court exercise judicial restraint and limit its review to the narrowly presented issue regarding the limits of congressional power, rather than pass judgment on the wisdom of congressional action); see supra notes 156, 158–59 (discussing the category of actionable entities). Although referring to a constitutional issue decided by the Supreme Court, Justice Felix Frankfurter delivered wise advice on separation of powers and the role of the judiciary when he stated that "it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic." Id. at 120. Thus, the Sixth Circuit should also refrain from broadly declaring policy when a narrower disposition is available.
161. See Hiler, 177 F.3d at 545–47, 545 n.5 (holding "that individuals who do not otherwise meet the statutory definition of 'employer' cannot be held liable under the Rehabilitation Act's anti-retaliation provision," but reaching this decision without any supporting analysis other than stating in a footnote that the Rehabilitation Act "borrowed the definition of 'employer' from Title VII").
162. See id. at 546–47.
163. Id. (stating that, historically, relief was limited to equitable relief or back-pay, remedies which a supervisor traditionally would not have the ability or authority to provide).
164. See Carlson, supra note 69, at 297 (indicating that the distinction between employees and independent contractors is one that American society has grappled with for quite some time, without ever reaching a satisfactory conclusion).
165. See Hiler, 177 F.3d at 546 (indicating that the appellee's argument relied too heavily on analogizing to certain remedies available under the Rehabilitation Act that could also be provided by individuals, an argument that the court quickly dismissed as contrary to "a long line of precedent"). Because the discrimination claim in Hiler sought to find a supervisor personally liable for the discrimination, the appellee first had to address the additional threshold issue of
whether to incorporate the definition of employer from Title I or Title VII, which the Hiler court so casually assumed, is actually much more complex.166

2. The Eighth Circuit Treated Section 504 and Title I as Identical in Employment Coverage “Absent Authority to the Contrary”

The Eighth Circuit dealt with an issue more directly on point, but provided an even less persuasive argument than the Sixth Circuit in Hiler.167 In Wojewski the Eighth Circuit noted that “[t]he parties cite[d] no case that has decided whether a nonemployee can be a qualified individual under § 504.”168 As a result, the court denied the plaintiff’s section 504 claim, thus incorporating the Title I definition of employer due to the “similarity between Title I and the Rehabilitation Act, absent authority to the contrary.”169

Alarmingly, the Eighth Circuit’s decision lacked justification of its affirmation of the district court’s decision apart from the similarities between the ADA and Rehabilitation Act.170 The Eighth Circuit held that the district court’s rationale was inapplicable because the district court relied on a case that dealt with a plaintiff who was unquestionably an employee.171 The Eighth

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166. Compare supra notes 80 and 82 (describing the issue presented to the court in Hiler), with Fleming v. Yuma Reg’l Med. Cir., 587 F.3d 938, 941–46 (9th Cir. 2009) (providing a thorough analysis of the incorporation issue), cert. denied 130 S. Ct. 3468 (2010). Early attempts to enforce some of the Act’s requirements elucidated the complexity of the issues regarding Rehabilitation Act jurisprudence. See O’BRIEN, supra note 7, at 128–29. These issues were mainly due to the fact that Congress provided no independent enforcement authority for the implementation of the Act’s provisions, leaving it to the courts to interpret the Act as implemented by the various regulatory bodies. See id. This led to a great deal of “judicial experimentation.” See supra note 61 and accompanying text.

167. See infra notes 168–72 and accompanying text (examining the Eighth Circuit’s argument in Wojewski).

168. Wojewski v. Rapid City Reg’l Hosp., Inc., 450 F.3d 338, 344 (8th Cir. 2006). This was a failure by the plaintiff’s attorney who neglected to analogize the case to Schrader, which was decided four years earlier and perhaps could have been useful. See generally Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968 (10th Cir. 2002). While not a suit by an independent contractor, Schrader addressed the broader question in Wojewski of whether section 504 contemplates the ADA’s employer-employee relationship. See id. at 971–95. The plaintiff in Wojewski focused on fringe issues and even cited a case that never reached the merits because the claim was barred by the statute of limitations. See Wojewski, 450 F.3d at 344–45.

169. Wojewski, 450 F.3d at 345.

170. See id.

171. Id. The Eighth Circuit indicated that the district court decision rested upon the conclusion that “a qualified individual with a disability,” as provided in section 504(a), must be an employee to be “qualified.” Id. (citing Beauford v. Father Flanagan’s Boys’ Home, 831 F.2d 768, 771 (8th Cir. 1987)). The district court cited language from Beauford indicating that “section 504 was designed to prohibit discrimination within the ambit of an employment relationship” in coming to their conclusion that only employees may bring suit under section
Circuit, however, upon disregarding this rationale, did not supply any additional precedent when it affirmed the district court’s decision to apply the Title I definition of employer to Mr. Wojewski’s section 504 claim. In addition, the Eighth Circuit did not address whether it supported the district court’s assertion that “a qualified individual with a disability” must be an employee. As a result, the Eighth Circuit raised, but did not answer, a major question regarding one of the premises of the district court’s decision.

B. The Ninth and Tenth Circuits Provided an Extensive Analysis of the Statute’s Plain Language, Case Law, and Legislative History.

1. The Plain Language of the Statute Supports the Conclusion that No Specific Employment Relationship Was Contemplated in Section 504

In Schrader, decided four years prior to Wojewski, the Tenth Circuit addressed the “qualified individual” question that had been avoided by the Eighth Circuit. The court asserted that the “otherwise qualified individual” language should be interpreted as meaning an individual who is “otherwise qualified to participate in the program.” Accordingly, the court concluded that the number of employees has no bearing on whether one of those employees is a qualified individual. The regulations that enforce section 504 support this interpretation; for instance, a Department of Health and Human Services regulation provides that an otherwise qualified individual is one “who, with reasonable accommodation, can perform the essential functions of the job in question.” The use of the word “qualified” is intended to focus on the person’s qualifications to perform the task, rather than encompassing any other potential statutory qualifications.

172. Wojewski, 450 F.3d at 345.
173. Id.
174. Id. at 344–45.
175. See Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 973–74 (10th Cir. 2002) (indicating that, with regard to the adoption of section 504(d), the issue of who was intended to be covered by the statute “has been resolved separately,” and thus the incorporation of Title I was not intended to affect the matter at hand).
177. Schrader, 296 F.3d at 971 (internal quotation marks omitted) (quoting Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1151) (listing requirements of a prima facie case under section 504 of the Rehabilitation Act).
178. See id. at 971–72.
179. 45 C.F.R. § 84.3(l)(1) (2010).
180. See Beauford v. Father Flanagan’s Boys’ Home, 831 F.2d 768, 771 (8th Cir. 1987) (“[S]ection 504 was designed to prohibit discrimination within the ambit of an employment relationship in which the employee is potentially able to do the job in question.”); see supra note 71 (listing regulations of a number of agencies implementing the Rehabilitation Act that interpret “qualified individual” as one who is qualified to participate in the particular program or activity).
Section 504(a) extends coverage to any "program or activity" receiving federal funds. As noted in Schrader, the definition of "program or activity" enumerates a broad range of entities, but most importantly, it includes sole proprietorships. Nothing in section 504 indicates that small providers are exempt; in fact, the regulations enforcing section 504 imply that small providers are covered in most circumstances.

An "otherwise qualified individual" is thus not required to meet additional qualifications beyond the ability to perform the required work, and coverage of programs and activities is not limited beyond the explicit provisions of section 504.

2. The Similarities Between Section 504 and Title I Are Not Dispositive, and the Distinctions Are Vast

The Ninth and Tenth Circuits made strong arguments opposing the Eighth Circuit's holding that the similarities between the Rehabilitation Act and the ADA compel the conclusion that section 504 incorporates the Title I definition of "employer." Notably, the Rehabilitation Act, as a product of the spending power, does not apply unless the discriminating entity has accepted federal funding; the ADA, as a product of the commerce power, requires no such voluntary action to apply. Further, the determination that the constitutional underpinnings of both statutes are different evinces the scopes of these statutes, despite assertions by the Eighth Circuit to the contrary.

182. Schrader, 296 F.3d at 973 (quoting 29 U.S.C. § 794(b)).
183. Id.
184. See, e.g., 28 C.F.R. § 42.503(f) (2010) (indicating that small providers are not required to provide auxiliary aids when doing so would significantly impair the ability to provide benefits and services, which implies that the regulations are otherwise generally applicable to small providers).
186. Compare Wojewski v. Rapid City Reg’l Hosp., Inc., 450 F.3d 338, 395 (8th Cir. 2006) (finding the Rehabilitation Act inapplicable to independent contractors), with Fleming v. Yuma Reg’l Med. Ctr., 587 F.3d 938, 941–42, 945–46 (9th Cir. 2009) (incorporating the substantive standards from Title I into the Rehabilitation Act, but allowing suit by an independent contractor because the language of the Rehabilitation Act is much broader than Title I), cert. denied 130 S. Ct. 3468 (2010), and Schrader, 296 F.3d at 975 (holding that the ADA’s definition of employer was not incorporated into section 504).
187. See Schrader, 296 F.3d at 974; see supra notes 84, 124–26 and accompanying text (discussing the differing constitutional underpinnings of the ADA and the Rehabilitation Act).
188. Fleming, 587 F.3d at 941–42, 942 n.3; see supra notes 124–25 and accompanying text (describing the fundamental constitutional differences between the ADA and the Rehabilitation Act that play a critical role in their individual application and scope).
3. Legislative Intent Further Indicates that Each Statute Serves a Different but Important Role in Society

While both the Rehabilitation Act and the ADA serve the interests of the disabled, the initial purpose and scope of each bill differed slightly.\(^{189}\) The Rehabilitation Act originated after World War I to address the need for increased services benefiting the physically disabled to ultimately incorporate them back into society.\(^{190}\) The ADA, however, began as a true civil rights statute, explicitly prohibiting discriminatory conduct against the disabled.\(^{191}\) Although there has been a great deal of overlap in terms of coverage and protection, the Rehabilitation Act had an initial focus on rehabilitating the individual, while the ADA focused more on curing society of its ills.\(^{192}\)

4. The Supreme Court Has Historically Prohibited Incorporation that Restricts the Scope of Section 504

Supreme Court precedent supports the Ninth and Tenth Circuit determinations that section 504 does not incorporate the Title I definition of employer.\(^{193}\) In Darrone, the Supreme Court refused to limit the scope of the

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189. Compare supra notes 43–51 (discussing the Rehabilitation Act’s initial focus on curing the person of his or her disability), with supra notes 66–68 (discussing the ADA’s more “humanitarian approach” and greater emphasis on preventing discrimination against the disabled in society). Congress enacted the Rehabilitation Act as a means to train those who could not work, at least under society’s perception at the time, and allow them to reenter mainstream society. See H.R. REP. NO. 93-244, at 3 (1973). On the other hand, the ADA was designated as a “national mandate for the elimination of discrimination.” 42 U.S.C. § 12101(b)(1) (2006).

190. See supra note 50 and accompanying text. The history behind the Rehabilitation Act, including precursory statutes dating back to 1920, indicates that the intent of those programs was, first and foremost, to rehabilitate physically disabled veterans returning home from war, and to return them to productive members of society. See Vocational Rehabilitation Act, ch. 107, 40 Stat. 617, 617 (1918) (“To provide for vocational rehabilitation and return to civil employment of disabled person discharged from the military or naval forces.”).


192. See supra note 189. As an analogy, prima facie cases of civil battery and criminal assault have a number of overlapping elements and serve similar interests of the plaintiff and victim in either case. Compare RESTATEMENT (SECOND) OF TORTS § 13 (1965) (finding liability for battery when an actor “intending to cause harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and . . . a harmful contact with the person of the other directly or indirectly results”), with MODEL PENAL CODE § 211.1(1)(a) (1962) (finding someone guilty of simple assault if he “attempts to cause or purposely, knowingly or recklessly causes bodily injury to another”). Nevertheless, the civil cause of action is brought by the injured party and aims to make the plaintiff whole again, whereas the criminal cause of action is brought by the state for the greater good of society.

Rehabilitation Act by incorporating restrictive language from Title VI without explicit language in section 504 requiring as much.194 Such precedent is helpful in resolving the question of Title I incorporation because, although section 504(d) incorporates standards from Title I, there is no language explicitly limiting the scope of section 504 in any way.195 Following Supreme Court precedent, section 504(d) does not incorporate the Title I employer-employee relationship because such incorporation would limit section 504's plain language and there is no explicit language permitting any limitation to that effect.196

5. Although It Improperly Framed the Issue, the Ninth Circuit Was Persuasive in Its Conclusion

The Ninth Circuit's opinion in Fleming improperly broadened the scope of the question presented, and inadequately addressed a significant argument in favor of incorporating Title I into section 504.197 The appellee, favoring incorporation of the ADA's employer-employee relationship, argued that "[s]ection 504(d) plainly refers us to Title I of the ADA 'as such sections refer to employment.'"198 The court, choosing to avoid this argument, indicated that, even though "jot-for-jot" incorporation provides easier enforcement, "our own administrative convenience is not a factor in determining what Congress meant."199 However, the appellee in Fleming did not ask for total incorporation and never explicitly argued for incorporation of any definition other than employer and employee.200 Thus, the Fleming court's finding that total incorporation would lead to inconsistencies within the Rehabilitation Act inaccurately characterized the issue.201 Nevertheless, the Ninth Circuit exhaustively discussed the narrower incorporation issue,202 thus, its overbroad

provisions and available remedies from other statutes. E.g., 29 U.S.C. § 794a(a) (2006) (incorporating the remedies available under Title VII of the Civil Rights Act into section 501 of the Rehabilitation Act and the remedies available under Title VI into section 504); 42 U.S.C. § 12203(c) (2006) (incorporating the remedies and enforcement procedures from Title I into the antiretaliation provisions of the ADA).

195. See 29 U.S.C. § 794(d)(2006). Section 504(d) of the Rehabilitation Act briefly mentions that the standards from Title I will be used, yet it does not elaborate on the extent of any incorporation. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, sec. 506, § 504(d), 106 Stat. 4344, 4428 (codified as amended at 29 U.S.C. § 794(d)).
196. See supra notes 192–95 and accompanying text.
197. See infra notes 198–201 and accompanying text.
199. Id.
200. Appellee of Yuma Anesthesia Medical Services' Answering Brief at 9–17, Fleming, 587 F.3d at 938 (No. 07-16427) (arguing that the definitions from Title I generally should apply to section 504, but only discussing the definitions of employer and employee specifically).
201. See Fleming, 587 F.3d at 945.
202. See supra Part II.B.2.
characterization of the appellee’s argument should not negate an otherwise strong analysis of the actual issue presented.

C. The Implications of Denying Antidiscrimination Rights to a Growing Segment of the American Workforce Require that the Supreme Court Provide a Bright-Line Rule

Due to the current economic crisis, an escalating number of companies and organizations depend upon independent contractors.\textsuperscript{203} State laws vary on who qualifies as an independent contractor, but organizations are generally not required to provide health or other benefits to these workers regardless of the size of the organization.\textsuperscript{204} Organizations can avoid paying employment taxes by classifying workers as independent contractors.\textsuperscript{205} This has incentivized many organizations to lay off employees, or reclassify them as independent contractors, leading to increased enforcement of policies against worker misclassification nationwide.\textsuperscript{206} With this basic framework of incentives


\textsuperscript{204} Lisa Hordwedel Barton, Comment, Reconciling the Independent Contractor Versus Employee Dilemma: A Discussion of Current Developments as They Relate to Employee Benefits Plans, 29 CAP. U. L. REV. 1079, 1079 (2002). Although state laws vary, the right-to-control test is the most widely adopted standard. See RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (Tentative Draft No. 4, 2003) (defining an employee as “an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work”). This test is also used by the IRS in determining whether a worker is an employee for tax purposes. See Independent Contractor (Self-Employed) or Employee?, IRS.GOV (last updated Feb. 18, 2011), http://www.irs.gov/businesses/small/article/0,,id=99921,00.html.

\textsuperscript{205} Employment Taxes and Classifying Workers, IRS.GOV (last updated Apr. 1, 2010), http://www.irs.gov/newsroom/article/0,,id=177092,00.html ("[I]ndependent contractors are responsible for reporting and paying their own Social Security and income taxes."); see also Rosano v. Comm’r, 46 T.C. 681, 689–90 (1966) (holding that the petitioner was not required to cover her own self-employment taxes because she was under the “direction, supervision, and control” of the establishment in which she worked, and thus was considered an employee of the establishment).

already in place, and an increasing number of organizations relying on the labor of independent contractors, more and more workers will find themselves susceptible to discrimination and without recourse under either Title I or section 504 unless their jurisdiction follows the path of the Ninth and Tenth Circuits.

D. The Disabled Community Has Made Strides, but Entering the Third Decade of the ADA Continued Protection Must Be Mandated

According to a study in 1996 by the National Council on Disabilities, an estimated forty-nine million Americans suffer from physical or mental disabilities. This qualified the disabled as the largest minority group in the United States, according to the 1995 Census, surpassing African Americans and the elderly. The disabled should have a great deal of political and social exposure due to their numbers, and due to the fact that many become disabled later in life as a result of injury or illness during adolescence or adulthood. Nevertheless, the disabled have historically been considered the “other,” separated from society, and often face doubt as to their “very humanity.” As recently as 2005, the National Council on Disabilities recognized the great strides that have been made by the disabled in numerous areas, while also

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207. It is important to note the potential impact on numerous small businesses if the Supreme Court ultimately holds that section 504 is applicable outside of the Title I defined employer-employee relationship. This decision would place onerous burdens on small businesses under section 504, which mirrors those burdens Senator Hatch feared would result from Title III of the ADA without an exception for such businesses. See 135 CONG. REC. 19835 (statement of Sen. Hatch). Nevertheless, Senator Hatch proposed an alternative solution of providing additional federal tax credits to smaller entities that have undertaken significant expenses to accommodate the disabled, rather than allowing small businesses to discriminate. Id. Scholars also note that the distinction between independent contractors and employees is tenuous, and that statutory provisions covering only employees have been drafted more out of habit than reason. E.g., Carlson, supra note 69, at 363–64 (“[E]mployee status is the basis for defining the enterprises and institutions subject to the law, and for defining the individuals who enjoy the protection of the law. An employer who employs ten employees and fifteen independent contractors is not subject to the law and is free to discriminate. An employer who is subject to the law can also discriminate, provided it only discriminates against its independent contractors.”). Professor Richard R. Carlson then proposed that gross revenue would be a better determinant of coverage. Id. at 366.


209. Id.

210. See O’BRIEN, supra note 7, at 1 (“As Justin Dart, a disability rights activist, explains, ‘[d]isability used to signal the end of active life. Now it is a common characteristic of a normal life-span.’” (quoting Justin Dart, Fallacy and Truth About the ADA, WASH. POST, July 18, 1995, at A11)).

211. Id. at 1–2 (quoting ROBERT F. MURPHY, THE BODY SILENT 117 (1987)).
indicating that "there are still major obstacles that prevent equal access for people with disabilities."212 This continued lack of access to jobs, combined with the general lack of protection provided to independent contractors, creates a subclass of workers who are denied many of the rights and entitlements of the average American employee.213

To adhere to the intent and plain language of the Rehabilitation Act, the Supreme Court should resolve the circuit split by holding that the decisions of the Ninth and Tenth Circuits are correct.214 Such a ruling would unequivocally protect all people, like Kim, from disability discrimination in the workplace.

IV. CONCLUSION

Under the current state of the law, independent contractors and employees of small businesses can be discriminated against on the basis of a disability by companies receiving federal funds; these individuals are provided no recourse in a number of jurisdictions.215 Federally funded programs, however, should be held to a higher standard—one that the Rehabilitation Act intended to require.216 Currently, the Sixth and Eighth Circuits allow for federal funds to assist in employment discrimination of persons who are otherwise capable of reasonably performing the job in question.217 Such discrimination would not be tolerated based on other protected classifications.218 As a result, the Supreme Court must render a judgment on this matter. A bright-line rule indicating that the Title I definition of employer is not incorporated into section 504 of the Rehabilitation Act would close a gaping hole in disability rights jurisprudence, as well as shore up the rights of small business employees and independent contractors.219

213. See supra notes 202–06 and accompanying text.
214. See supra Part III.B.
215. See supra note 1617 and accompanying text.
216. See supra Part III.B.
217. See supra Part II.A.
219. See supra Parts III.C–D.