

COMMENT

PLASTIC STRAW BANS CAN RUN AFOUL OF THE AMERICANS WITH DISABILITIES ACT

DUNCAN J.J. KESSLER*

Policies and legislation targeting plastic straws have grown significantly in the past years. These policies and laws curtail the automatic inclusion of plastic straws, set requirements for the material straws should be made from, and otherwise seek to curb the environmental impact of plastic by banning plastic straws in particular. While laudable in intent, these laws and policies frequently—though not always—ignore people with a wide range of disabilities for whom the lack of plastic straws poses a challenge. Further, the substitute of various other materials—such as paper, plastic, glass, and metal to name a few—can both pose a physical risk for disabled people and reduce the enjoyment of or otherwise eliminate the possibility of using many commonplace goods and services. This Comment analyzes various policies and laws at the state and local level in light of the Americans with Disabilities Act (ADA) and places these policies and laws on a spectrum—from those which minimally interfere with the enjoyment of a good or service and likely would not be violative of the ADA to those which provide a significant barrier to the use and enjoyment of goods and services provided by Title III public accommodations. It concludes with suggestions to companies and lawmakers considering these policies for how they can accomplish their goals of limiting plastic straw waste while being mindful of their customers and constituents who may need them.

* Articles Editor, *American University Law Review*, Volume 69; J.D. Candidate, May 2020, *American University Washington College of Law*. Many thanks to my friends and family for their support, the *AULR* staff for their hard work, and my friends in the service industry for their encouragement and inspiration. Additionally, much gratitude to Professors Alvarez and Dinerstein for their time and suggestions. All work is a reflection of the author's views alone.

TABLE OF CONTENTS

Introduction.....	3
I. Background.....	6
A. The Last (Plastic) Straw—The Movement to Ban Plastic Straws.....	6
1. The current state of straw bans	8
2. The range of bans—from most restrictive to least restrictive.....	9
a. Outright bans.....	9
b. Bans with exemptions.....	10
c. Non-automatic inclusion	12
2. The major hazards of non-plastic straws	12
B. The Americans with Disabilities Act	14
1. Title III—people with disabilities and public accommodations	15
a. Public accommodations	15
b. What constitutes a disability	16
2. Title III provisions—denial of service, full and equal enjoyment, and reasonable modifications.....	19
3. Straws and the ADA	23
II. Analysis	25
A. Businesses Affected by Plastic Straw Bans Qualify as Public Accommodations under Title III.....	25
B. People Affected by Plastic Straw Bans Qualify as Disabled under Title III	28
C. Having No Plastic Straws Prevents the Full & Equal Enjoyment of Services and Goods Provided by the Public Accommodation Because People with Disabilities Cannot Partake in the Liquids Being Provided.....	29
1. Restaurants provide a good/service for which plastic straws are needed	29
2. Outright bans and bans with only certain limited exceptions deny this good/service	29
D. Providing Plastic Straws Can Be Considered a Reasonable Modification to Policies or Regulations Preventing their Distribution	31
E. Going Forward, Companies and Legislators Should Reconsider These Policies to Mitigate	

the Impact of Plastic Straw Bans on the Disabled Community	35
Conclusion	36

INTRODUCTION

Marvin C. Stone, Civil War veteran and journalist in Washington, D.C., was sick of drinking his mint juleps through rye¹—the reeds cracked, left a musty taste, and tended to dissolve into his drink.² Stone, a tinkerer, found his solution by wrapping paper around a pencil and carefully gluing it,³ and in 1888, he acquired Patent No. 375,962 for the artificial drinking straw in order “to provide a cheap, durable, and unobjectionable substitute for the natural straws commonly used for the administration of medicines, beverages, [etc.]”⁴ The Stone Straw Factory in the capital soon became a manufacturing behemoth and was pumping out eight million straws a day by the 1950s.⁵ The increasingly cheap cost of producing plastics at the time, as well as the explosion of the fast-food industry (which featured soda-cups with crosshairs that tended to tear into paper straws), saw the subsequent rise of the plastic straw.⁶

1. John Kelly, *Good to the Last Drop: The Drinking Straw Was Invented in Washington*, WASH. POST (Nov. 3, 2018), https://www.washingtonpost.com/local/suck-on-this-the-drinking-straw-was-invented-in-washington/2018/11/03/f6050bae-deb8-11e8-b3f0-62607289efee_story.html; John Kelly, *Stone Straw Is Long Gone from Washington. Its Memory Lingers*, WASH. POST (Nov. 17, 2018), <https://www.washingtonpost.com/local/stone-straw-is-long-gone-from-washington-its-memory-lingers/2018/11/17/3381e13e-e867-11e8-a939-9469f1166f9d>.

2. Matthew B. Gilmore, *What Once Was: Washington DC, Center of Manufacturing*, THE INTOWNER (July 18, 2015), <http://intowner.com/2015/07/18/washington-dc-center-of-manufacturing> [<https://perma.cc/FE4Q-QT7X>]; Kelly, *supra* note 1.

3. Kelly, *supra* note 1; *History*, STONE STRAW, <http://www.stonestraw.com/history> [<https://perma.cc/8MST-TSVC>].

4. U.S. Patent No. 375,962 col. 1 l. 8-11 (filed Jan. 3, 1888).

5. Kelly, *supra* note 1.

6. See Sarah Gibbens, *A Brief History of How Plastic Straws Took Over the World*, NAT’L GEOGRAPHIC (July 9, 2018), <https://www.nationalgeographic.com.au/nature/a-brief-history-of-how-plastic-straws-took-over-the-world.aspx> [<https://perma.cc/UW7U-QS-PU>] (attributing the mass production of plastic to wartime plastic manufacturers turning their attention to consumer goods after the second world war ended); Emelyn Rude, *The Backlash Against Plastic Straws Is Spreading. Here’s How They Got So Popular in the First Place*, TIME (July 12, 2018), <https://www.time.com/5336242/plastic-straws-history> [<https://perma.cc/PJ2X-43AY?type=image>] (following the Second World War, consumers had more income to spend on fast-food meals).

Almost 131 years to the day after the patent filing, Washington, D.C. would return to the humble paper and plant-based straw, as a ban on plastic straws went into effect on January 1, 2019.⁷ Although a bill explicitly adding this language to the D.C. Code died in chamber,⁸ plastic straws were arguably already outlawed by a 2014 act banning polystyrene materials in foodservice wares.⁹ On October 29, 2018, new restrictions singling out plastic straws and stirrers were put in place.¹⁰ Like the language in the proposed bill, these regulations went into effect on January 1, 2019.¹¹

Washington, D.C. is not alone; states, cities, and companies across the nation have taken up policies and legislation banning plastic straws.¹² Largely motivated by environmental concerns, these codes and policies are certainly laudable.¹³ Plastics pollution is a growing

7. See '962 Patent; *Food Service Ware*, D.C. DEP'T OF ENERGY & ENV'T, <https://doee.dc.gov/foodserviceware> [<https://perma.cc/2QSB-RSBL>].

8. Sustainable Straws and Stirrers Amendment Act of 2018, Council B. 22-0902, Period 22 (D.C. 2018).

9. See Sustainable DC Omnibus Act of 2014, Council Act 20-385, Period 20 (D.C. 2014) (phasing out the use of disposable foodservice ware that is not compostable or recyclable and ultimately providing for a ban of such products by January 1, 2017); see also Adele Chapin, *Why a Plastic Straw Ban in D.C. Would Be Redundant*, EATER (July 19, 2018, 9:01 AM), <https://dc.eater.com/2018/7/19/17589960/plastic-straw-ban-dc> [<https://perma.cc/G8VJ-U8B6>] (stating that plastic straws were already banned in the District of Columbia since January 2017); Lori McCue, *Plastic Straws Are Technically Already Illegal in the District. So What's with This Bill to Ban Them?*, DCIST (July 12, 2018, 12:10 PM), <https://dcist.com/story/18/07/12/actually-plastic-straws-are-already> [<https://perma.cc/4ZHF-A9WV>] (arguing that while plastic straws have been banned since 2014, new legislation is needed to codify the commitment).

10. *Food Service Ware*, *supra* note 7.

11. *Id.*; Fenit Nirappil & Arelis R. Hernandez, *A Plastic Straw Ban and a Confederate Name Change: New Laws in the D.C. Region in 2019*, WASH. POST (Dec. 31, 2018), <https://www.washingtonpost.com/local/dc-politics/a-plastic-straw-ban-and-a-confederate-name-change-new-laws-in-the-dc-region-in-2019/2018/12/31/60e4d954-0d1c-11e9-831f-3aa2c2be4cbd>.

12. See Gibbens, *supra* note 6 (naming McDonald's, Bon Appetit Management, and Alaska Airlines as a few of the large companies phasing out plastic straws); Alix Langone, *All the Major Companies That Are Banning Plastic Straws*, TIME: MONEY (July 18, 2018, 11:00 AM), <http://time.com/money/5333715/starbucks-hyatt-ban-plastic-straws> [<https://perma.cc/59FW-J9HG>] (naming Seattle as the largest city in the United States to ban the use of plastic straws, with cities like Malibu, Oakland, and Berkeley not far behind).

13. For example, see the findings introducing the amendment to San Francisco's Environmental Code entitled "Single-Use Food Ware Plastics, Toxics, and Litter Reduction":

(a) The production and management associated with single-use food and beverage service ware, typically used for only a few minutes before being discarded, has significant environmental impacts, including environmental

crisis, and targeted bans directed at objects are one way to address this crisis.¹⁴ However, in drafting these bans, companies and legislators have overlooked a vulnerable and significant demographic—people with disabilities.¹⁵ Without change, there may be legal ramifications, because this demographic is protected under federal law. Congress passed the Americans with Disabilities Act (ADA) in the 1990s to protect disabled people from suffering discriminatory treatment.¹⁶

This Comment argues that state and local ordinances, as well as company policies, that flatly ban plastic straws without either limited exceptions or requirements for a range of substitute material options violate the denial of service, full and equal enjoyment, and reasonable modification provisions of Title III of the ADA.¹⁷ This Comment then

contamination; consumption of energy, water, and non-renewable polluting fossil fuels; emissions of greenhouse gases; air and water pollutants; depletion of natural resources; litter on streets and in waterways; plastic pollution; and increased litter clean-up and discard management costs (d) Plastic straws were among the top 10 items collected during the California Coastal Cleanup Day from 1989 to 2014, and seven of the 10 were single-use food and beverage service ware items. These items accounted for 34% of total trash collected.

S.F., CAL. Ordinance No. 294-18 § 2 (2018); see *The Last Plastic Straw*, PLASTIC POLLUTION COAL., <https://www.plasticpollutioncoalition.org/no-straw-please> [<https://perma.cc/3N4S-3PN3>] (emphasizing the meaningful impact “collective engagement around the gateway issue of plastic straws” will have on individuals and businesses thinking about plastic pollution).

14. See American University Washington College of Law Animal Law Society Symposium: The Global Plastics Crisis: Legal Solutions and the Path Forward (Mar. 29, 2019) (recording on file with author) (discussing the damaging environmental and health effects of plastic). *But see* Ken Kopocis, Env'tl. Prot. Agency, Former Deputy Assistant Adm'r, Panel Remarks at the American University Washington College of Law Animal Law Society Symposium: The Global Plastics Crisis: Legal Solutions and the Path Forward (Mar. 29, 2019) (recording on file with author) (stating that forcing producers of plastics to internalize the cost of pollution, rather than resorting to bans or taxes which affect the public at large, may be a better approach to solving the plastics crisis).

15. See, e.g., Karin Hitselberger, *Plastic Straw Bans Are the Latest Policy to Forget the Disability Community*, WASH. POST: POSTEVERYTHING (July 12, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/07/12/plastic-straw-bans-are-the-latest-policy-to-forget-the-disability-community> (noting that some disabled people cannot use reusable straws or redesigned lids and need plastic straws).

16. The Americans with Disabilities Act is codified at 42 U.S.C. §§ 12101–213 (2012). See *Introduction to the ADA*, U.S. DEP'T OF JUST. C.R. DIV., https://www.ada.gov/ada_intro.htm [<https://perma.cc/J4RJ-76VJ>] (describing the ADA as “one of America’s most comprehensive pieces of civil rights legislation”).

17. 42 U.S.C. § 12182(a); see discussion *infra* Section I.B.0 (providing examples of denial of services under the ADA).

proposes three legal frameworks that both legislatures and companies can pursue to better align with the ADA's mission.

Part I examines the new trend of plastic straw bans among state and local governments as well as national companies. Part I also discusses the background of the ADA. Part II analyzes these laws and policies considering the language of the statutes, past ADA litigation, and the ADA's legislative history. Part II then organizes these laws and policies on a spectrum from most likely to transgress the ADA (the outright bans) to not likely to transgress the ADA (non-automatic dispensation).¹⁸ Finally, Part II provides three suggestions for legislators and companies considering implementing plastic straw bans. This Comment concludes with broader policy concerns surrounding disabled people.

I. BACKGROUND

A. *The Last (Plastic) Straw—The Movement to Ban Plastic Straws*

For the last century, and particularly in the last couple decades, there has been a growing awareness of the importance of protecting the environment.¹⁹ This awareness has resulted in not only changes to personal behavior, but a growing body of laws and regulations designed to protect the environment.²⁰ The plastic bag was an early target for such regulation.²¹

18. See discussion *infra* Section I.A.2.iii (defining non-automatic dispensation as regulations that do not ban plastic straws but require they be requested before receiving one).

19. Steven Cohen, *The Growing Level of Environmental Awareness*, HUFFINGTON POST (Feb. 28, 2015), https://www.huffingtonpost.com/steven-cohen/the-growing-level-of-envi_b_6390054.html [<https://perma.cc/9JPC-G5LK>] (partly attributing the growth of environmental awareness to young people being educated in the environmental era, activists pushing companies to pay attention to the maintenance of our forests, and a shift in values).

20. *Id.* (“This awareness, which could be labeled a paradigm shift, is exerting pressure on many of the day-to-day actions routinely undertaken by corporations, government agencies and nonprofits, along with behaviors seen in communities and households. Individual behavior is changing as well.”).

21. See generally *From Birth to Ban: A History of the Plastic Shopping Bag*, U.N. ENV'T PROGRAMME (Apr. 25, 2018), <https://www.unenvironment.org/news-and-stories/story/birth-ban-history-plastic-shopping-bag> [<https://perma.cc/R4WA-7DEF>] (identifying Bangladesh as the first country in the world to ban plastic bags in 2002). For more information on U.S. plastic bag regulation, see *State Plastic and Paper Bag Legislation*, NAT'L CONF. OF ST. LEGISLATURES (Aug. 15, 2019), <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx> [<https://perma.cc/GBK2-H48J>].

Generally, this regulation comes in either the form of plastic-bag taxes²² or plastic-bag bans.²³ Regulation has extended beyond just bags to include a range of plastic items.²⁴ For example, there was a bipartisan push in 2015 to ban small plastic beads used in cosmetics.²⁵ A popular target for this regulation in recent years has been single-use foodservice ware.²⁶ In 2018, plastic straw bans became a global trend, spurred in part by a 2015 viral video featuring a sea turtle with a straw up its nose.²⁷ Plastic straw boycotts gained traction over the subsequent years and were vaulted into the

22. Boulder, Colorado; Washington, D.C.; Montgomery County, Maryland; Portland, Maine; and New York City all impose a plastic bag tax. BOULDER, COLO., REV. CODE § 6-15-3(a) (2012); D.C. CODE § 8-102.03 (2019); MONTGOMERY CTY., MD., CODE § 52-78(a) (2019); PORTLAND, ME., CITY CODE § 12-232(b) (2015); N.Y.C., N.Y., ADMIN. CODE § 16-491 (2017).

23. San Francisco, California; Los Angeles, California; Boston, Massachusetts; and Seattle, Washington all ban plastic bags. S.F., CAL., ENV'T CODE § 1703(a) (2019); L.A., CAL., MUN. CODE ch. XIX, art. 2 § 195.02 (2019); BOS., MASS., CITY CODE ch. XVII § 17-20.3(a) (2017); SEATTLE, WASH., MUN. CODE § 21.36.100 (2019). *But see* City of Laredo v. Laredo Merchs. Ass'n, 550 S.W.3d 586, 598 (Tex. 2018) (striking down a Texas city's plastic bag ban); *AG Paxton Warns 11 Cities Their Bag Bans Are Illegal*, TEX. ATT'Y GEN. OFF. (July 2, 2018), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-warns-11-cities-their-bag-bans-are-illegal> [<https://perma.cc/2JR8-GW9K>] (issuing notices to 11 Texas cities that their plastic bag ban is illegal under *Laredo*).

24. *See* Brian Clark Howard et al., *A Running List of Action on Plastic Pollution*, NAT'L GEOGRAPHIC (June 10, 2019), <https://www.nationalgeographic.com/environment/2018/07/ocean-plastic-pollution-solutions> [<https://perma.cc/866R-AVZ7>] (cataloging efforts around the world to limit plastic pollution).

25. Microbead-Free Waters Act of 2015, Pub. L. No. 114-114 (2015).

26. Martin Bourque, Executive Director of the Berkeley Ecology Center, notes that food-ware “is two-thirds of street litter It’s commonplace and unnecessary and, in many cases, has exploded in the last decades. It’s something that municipalities have a high degree of control over, whereas packaging is more difficult.” Jonathan Kauffman, *Berkeley Gets Tough on Takeout with Nation’s Strictest Limits on Disposable Food Ware*, S.F. CHRONICLE (Jan. 24, 2019), <https://www.sfchronicle.com/restaurants/article/Berkeley-s-new-regulations-on-disposable-foodware-13557207.php> [<https://perma.cc/LG2X-DZ8S>]. Nor is this trend limited to liberal-leaning cities in the United States. *See, e.g.*, Ana Garcia Valdivia, *The End of Plastic Cutlery, Plates and Straws: EU Market Says Goodbye To Single-Use Plastic Products*, FORBES (Jan. 22, 2019, 7:25 AM), <https://www.forbes.com/sites/anagarciavaldivia/2019/01/22/the-end-of-plastic-cutlery-plates-and-straws-eu-market-says-goodbye-to-single-use-plastic-products> [<https://perma.cc/R8WT-UDRC>] (noting efforts by the European Union to restrict certain single-use plastic products including many forms of foodservice ware).

27. Sea Turtle Biologist, *Sea Turtle with Straw up Its Nostril—“No” to Plastic Straws*, YOUTUBE (Aug. 10, 2015), <https://www.youtube.com/watch?v=4wH878t78bw>; Brenna Houck, *Why the World Is Hating on Plastic Straws Right Now*, EATER (July 12, 2018, 11:09 AM), <https://www.eater.com/2018/7/12/17555880/plastic-straws-environment-pollution-banned-alternatives-ocean-sea-turtle-viral-video> [<https://perma.cc/KL5Q-J4NM>].

public conscience with the assistance of celebrities like Tom Brady²⁸ and politicians like U.K. Prime Minister Theresa May.²⁹ Additionally, activist organizations such as “Our Last Straw” sprung up around this time to encourage governments and businesses to ditch the plastic straw.³⁰ In mid-2018, Seattle became the first major city in the United States to institute a plastic straw ban.³¹

1. *The current state of straw bans*

Bans on plastic straws have come from both public and private actors, affecting a range of businesses and organizations. Multiple cities in recent years and one state have passed straw ban laws or regulations.³² Some of the laws and ordinances in place are specifically targeted towards restaurants,³³ while others are more generally aimed at any business or organization that might provide food service ware.³⁴ Many companies, including many restaurants and bars, but also airlines, hotels, and even amusement parks, have instituted their own policies prohibiting plastic straws or the automatic distribution of plastic straws.³⁵

28. Tom Brady (@tombrady), INSTAGRAM (June 5, 2018), <https://www.instagram.com/p/BjqWDkNBb54/?taken-by=tombrady> [<https://perma.cc/2K5G-E6BG>].

29. Laura Hughes, *Theresa May Steps Up War on Plastic Waste with Straws Ban*, FIN. TIMES (Apr. 18, 2018), <https://www.ft.com/content/7565c85c-4328-11e8-803a-295c97e6fd0b>.

30. *About*, OUR LAST STRAW, <https://www.ourlaststraw.org/about> [<https://perma.cc/R5J7-4PA6>].

31. SEATTLE, WASH., MUN. CODE § 21.36.084 (2019).

32. These jurisdictions include the state of California and the following cities: Malibu, California; Manhattan Beach, California; Richmond, California; San Francisco, California; San Luis Obispo, California; Santa Barbara, California; Washington, D.C.; St. Petersburg, Florida; Fort Myers Beach, Florida; Monmouth Beach, New Jersey; and Seattle, Washington. CAL. PUB. RES. CODE §§ 42270–71 (West 2019); MALIBU, CAL., MUN. CODE § 9.24.045 (2018); MANHATTAN BEACH, CAL., CODE OF ORDINANCES § 5.80.037 (2018); RICHMOND, CAL., MUN. CODE § 9.17.025 (2018); S.F., CAL., ENV'T CODE ch. 16 (2018); SAN LUIS OBISPO, CAL., CODE OF ORDINANCES §§ 8.09.010–.040 (2019); SANTA BARBARA, CAL., MUN. CODE §§ 9.165.010-.060 (2018); D.C. CODE §§ 8-1531 to -1537 (2019); ST. PETERSBURG, FLA., CODE OF ORDINANCES § 11-110 (2019); FORT MYERS BEACH, FLA., ORDINANCE No. 17-13 (2017); MONMOUTH BEACH, N.J., BOROUGH CODE § 3-17.3 (2018); SEATTLE, WASH., MUN. CODE § 21.36.084 (2019).

33. CAL. PUB. RES. CODE §§ 42270–71 (West 2019).

34. D.C. CODE §§ 8-1531 to -1537 (2019).

35. These companies include: Joe Coffee; Bon Appetit; DMK restaurants; Ted's Montana Grill; Luke's Lobster; Inday; Revival Food Hall; Lettuce Entertain You; Fox Restaurant Concepts; Starbucks; Eataly; Intelligentsia Coffee; Shake Shack; Edition Hotels; Royal Caribbean Cruises Ltd.; 1 Hotels; Hilton; Sixty Hotels; Kimpton Hotels and Restaurants; Four Seasons; Hyatt Hotels; Marriott International; Dell; Ikea; SeaWorld; White Sox, Guaranteed Rate Field; Disney theme parks (except Tokyo Disney); American Airlines; Alaska Airlines. See Kate Bratskeir, *A Running List of Restaurants, Hotels, and Cities in*

Conversely, one state has attempted to ban its cities from enacting plastic-straw bans, but this attempt was ultimately vetoed by its governor.³⁶

2. *The range of bans—from most restrictive to least restrictive*

These laws and policies can be organized into outright bans, bans with exemptions (such as those for financial hardship or people with disabilities), and bans on automatic inclusion. The following sections will discuss the differences in the various plastic straw ban policies nationwide as they may relate to the ADA.

a. *Outright bans*

Outright legal bans either flatly exclude plastic food service ware or explicitly target plastic straws. Examples include the regulation in Malibu, California, which reads: “No restaurant, including fast food restaurants, beverage provider, or vendor shall use, provide, distribute, or sell plastic beverage straws, plastic stirrers, or plastic cutlery.”³⁷ Another example from Monmouth Beach, New Jersey reads: “No business or store shall provide any . . . plastic straws to a customer at the check stand, cash register, point of sale, or other point of departure[.]”³⁸ Seattle’s ban states: “Effective July 1, 2010, food service businesses shall be prohibited from selling or providing food, for consumption on or off the premises, in or with disposable food service ware” and defines “disposable food service ware” as “non-compostable and non-recyclable containers, plates, ‘clamshells,’ serving trays, meat and vegetable trays, hot and cold beverage cups, wrappers, and utensils that are intended only for one-time use, including so-called biodegradable products where any portion is not compostable.”³⁹ Straws were temporarily exempted from Seattle’s ban but this exemption ended in

America Banning Plastic Straws, MIC (June 20, 2018), <https://mic.com/articles/189868/a-running-list-of-restaurants-hotels-and-cities-in-america-banning-plastic-straws> [<https://perma.cc/X6MR-UTXW>]; Langone, *supra* note 12.

36. The Florida bill H.B. 771 would have put a moratorium on local entities regulating plastic straws before July 2024: “Before July 1, 2024, a county, a municipality, or another entity of local government may not adopt or enforce an ordinance or other local regulation relating to single-use plastic straws.” H.B. 771, 2019 Legis., Reg. Sess. (Fla. 2019). The bill was ultimately vetoed by Governor Ron DeSantis on May 10, 2019—the Governor’s first veto in office. Samantha J. Gross, *DeSantis’ First Veto Allows Local Governments to Keep Banning Plastic Straws*, MIAMI HERALD (May 11, 2019 10:55 AM), <https://www.miamiherald.com/news/politics-government/state-politics/article-230280599.html>.

37. MALIBU, CAL., MUN. CODE § 9.24.045.

38. MONMOUTH BEACH, N.J., CODE OF ORDINANCES § 3-17.3 (2018).

39. SEATTLE, WASH. MUN., CODE §§ 21.36.086(A), 21.36.086(F) (2) (2019).

2018.⁴⁰ While Seattle has stated there is a waiver that allows restaurants to provide flexible plastic straws to those who need them for physical or medical reasons, this waiver is not widely known and does not appear in either the statute's language or business letter.⁴¹

In addition to municipalities, many companies have adopted some form of outright ban, though these likewise vary. For example, Ted's Montana Grill supplies paper only straws while Lettuce Entertain You provides paper, hay, and biodegradable straws.⁴² Starbucks has developed special lids and will provide non-plastic straws on request, while Intelligentsia Coffee will provide compostable straws upon request in addition to selling metal straws.⁴³ Some bans have not yet been implemented. For example, Kimpton Hotels and Restaurants has indicated that it is still reviewing its policy and will likely provide compostable and metal straws while Ikea wants to phase out plastic straws by 2020.⁴⁴

b. Bans with exemptions

Other bans feature some form of exemption to the law. These exemptions range from recognizing potential hardship for businesses, for the public, and for disabled people specifically. San Francisco's ban is essentially an outright ban with a financial hardship exception designed to alleviate the burden on businesses. It states that "[n]o person may sell,

40. See *Straws & Utensils*, SEATTLE PUB. UTIL. (2018) https://www.seattle.gov/util/cs/groups/public/@spu/@foodyard/documents/webcontent/1_074388.pdf [<https://perma.cc/Z7EU-YZMG>] (informing food service businesses that "the use of plastic utensils, plastic straws, and plastic cocktail picks will be prohibited in Seattle effective July 1, 2018").

41. Tove Danovich & Maria Godoy, *Why People with Disabilities Want Bans on Plastic Straws to Be More Flexible*, NPR (July 11, 2018, 8:02 AM), <https://www.npr.org/sections/thesalt/2018/07/11/627773979/why-people-with-disabilities-want-bans-on-plastic-straws-to-be-more-flexible> [<https://perma.cc/VG9K-8VY7>] (confirming that Seattle's plastic straw ban does include an alleged exception for restaurants to give disposable plastic straws to customers with special physical or medical needs, but most restaurants are unaware of it); see also Melissa Hellmann, *Straw Ban Leaves Disabled Community Feeling High and Dry*, SEATTLEWEEKLY (July 11, 2018, 1:30 AM), <https://www.seattleweekly.com/news/straw-ban-leaves-disabled-community-feeling-high-and-dry> [<https://perma.cc/6MFD-Y2UL>] (arguing that Seattle Public Utilities did not inform businesses about the existence of a waiver allowing the disabled community to use disposable flexible plastic straws).

42. See Bratskeir, *supra* note 35; Langone, *supra* note 12.

43. Bratskeir, *supra* note 35; see also Bonnie Rochman, *Straws Are Out, Lids Are In: Starbucks Announces Environmental Milestone*, STARBUCKS STORIES (July 9, 2018), <https://stories.starbucks.com/stories/2018/starbucks-announces-environmental-milestone> (announcing Starbucks' commitment to phasing out plastic straws by 2020).

44. See Bratskeir, *supra* note 35; Langone, *supra* note 12.

offer for sale, or otherwise Distribute within the City . . . any single-use straws, stirrers, splash sticks, cocktail sticks, or toothpicks made with plastic, including compostable, bio- or plant-based plastic.”⁴⁵ Furthermore, “[t]he Director may waive the provisions of Sections 1603(a), 1604(a), and 1605(a), (b), and (c) due to a financial hardship.”⁴⁶ Richmond’s law is a full plastic straw ban,⁴⁷ with a limited exemption for a public peace, health, or safety emergency.⁴⁸ Washington, D.C.’s law simply states: “[n]o food service entity shall sell or provide food in expanded polystyrene food service products, regardless of where the food will be consumed.”⁴⁹ While no exception exists on the face of the law, the D.C. Department of Energy & Environment advises on its webpage on food-service-ware that “[p]ursuant to the Americans with Disabilities Act and the DC Human Rights Act, some customers may request single-use plastic straws to consume food and beverages. Regulated entities must keep a stock of plastic straws available to meet these needs and remain compliant.”⁵⁰ The District notified affected businesses of this exception as the straw ban came into force, and this advisement is reprinted on business flyers promulgating the law, unlike the situation in Seattle.⁵¹ Santa Barbara’s law, however, appears the most inclusive on its face as it unequivocally bans all plastic straws and the automatic dispensing of alternatives.⁵² However, exemptions are

45. S.F., CAL., ENV’T CODE Ordinance No. 294-18 (2018) (modifying San Francisco Environmental Code chapter 16).

46. S.F., CAL., ENV’T CODE § 1606(d) (2016) (prior to 2018 amendment).

47. RICHMOND, CAL., MUN. CODE § 9.17.025(b) (2018).

48. *Id.* § 9.17.030(c) (“In a situation deemed by the City Manager or his/her designee to be an emergency for the immediate preservation of the public peace, health or safety, City facilities, food providers, City franchisees, contractors and vendors doing business with the City shall be exempt from the provisions of this chapter.”).

49. D.C. CODE § 8-1532(a) (2019).

50. *Food Service Ware*, *supra* note 7.

51. *See Straws and Stirrers: New Requirements*, D.C. DEP’T OF ENERGY & ENV’T, https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/19-1-4-straw-one-page%28for%20web%29.pdf [<https://perma.cc/42PM-JZUX>] (advertising the District’s list of compliant straws, with the exception of plastic straws for those with disabilities); *see also supra* notes 40–41 and accompanying text (arguing that businesses in Seattle were not given notice about the ordinance’s exemption); Julie Lawson, Dir. of Mayor Muriel Bowser’s Office of the Clean City, Panel Comments at the American University Washington College of Law Animal Law Society Symposium: The Global Plastics Crisis: Legal Solutions and the Path Forward (Mar. 29, 2019) (recording on file with author) (noting that D.C. makes efforts so that businesses are aware of the exception).

52. SANTA BARBARA, CAL., MUN. CODE § 9.165.030(A) (2018) (“It is unlawful for any food provider or beverage provider to use plastic beverage straws or stirrers, or to provide, distribute, or sell plastic beverage straws or stirrers to any person.”); § 9.165.030(B) (“Non-plastic alternative straws shall be provided only upon request.”).

available for businesses in cases of financial hardship, public emergencies, customer health, and people with disabilities.⁵³ The ordinance specifically names compliance with the ADA as the reason for the latter exemption.⁵⁴

c. Non-automatic inclusion

Some of these laws and policies are only slightly restrictive and do not ban the item itself but rather automatic inclusion of plastic straws with beverages. For example, California's state law reads: "A full-service restaurant shall not provide a single-use plastic straw to a consumer unless requested by the consumer."⁵⁵ However, the comments in the legislative history of this bill suggest the state may consider more stringent methods and/or encouraging the adoption of non-plastic methods through future legislation.⁵⁶ San Luis Obispo, California has a city ordinance that essentially repeats the state law but also features an exception for take-out items.⁵⁷ Several companies, such as Luke's Lobster, Inday, Revival Food Hall, and Hyatt Hotels, have also adopted a "request-only" policy for plastic straws.⁵⁸ Although these laws and policies have not seen a court challenge yet, they have spawned at least one arrest when a man attacked a McDonald's employee after the employee did not automatically include a straw in accordance with the local "request-only" law.⁵⁹

2. *The major hazards of non-plastic straws*

Non-plastic straw options pose a range of problems for people with disabilities. Whether or not a straw can be used by someone with a disability depends on its material, the liquid, and the disability in question. Paper and similar biodegradable straws can quickly fall apart, particularly in hot

53. § 9.165.050.

54. § 9.165.050(D)(3).

55. CAL. PUB. RES. CODE § 42271 (West 2019).

56. Concurrence in Senate Amendments, A.B. 1884, 2017–18 Sess., cmts. 2, 7, 9 (Cal. 2018).

57. SAN LUIS OBISPO, CAL., CODE OF ORDINANCES § 8.09.020 (2019) ("On or after March 1, 2018, any vendor shall ask each dine-in customer if the customer wants a single-use beverage straw before providing a single-use beverage straw to the customer."); § 8.09.030 ("Take-out food orders are exempt from this chapter.")

58. Bratskeir, *supra* note 35; Langone, *supra* note 12; *see also* Press Release, Hyatt, Hyatt Announces Global Efforts to Reduce Single-Use Plastics (July 9, 2018), <https://newsroom.hyatt.com/news-releases?item=123702> [<https://perma.cc/4Q8W-NFHB>] (announcing Hyatt's request only policy for plastic straws).

59. *See* Christina Zdanowicz, *A Man Attacked a McDonald's Employee Over a Straw and She Fought Back*, CNN (Jan. 4, 2019), <https://www.cnn.com/2019/01/02/us/customer-attacks-mcdonalds-employee/index.html> [<https://perma.cc/5FBK-PVFU>].

liquids.⁶⁰ Further, this type of straw can present both a burning and choking hazard and is easy for people with limited jaw control to bite through.⁶¹ Additionally, many non-plastic straw options are not flexible—a key attribute for people with mobility challenges.⁶² Reusable straws need to be washed, which is difficult for many people with disabilities and provides an additional burden that cannot always be met, particularly on a spontaneous stop at a store.⁶³ Metal and glass straws conduct heat and cold, which can make them dangerous for a host of beverages as well as for soups.⁶⁴ Glass and bamboo straws can shatter or splinter, which poses a heightened risk to people with poor mobility control in addition to being less flexible.⁶⁵ While some types of non-plastic straws work in certain cases for certain disabilities, no alternative appears to work as well, across the board, as the plastic straw.⁶⁶

60. See Hitselberger, *supra* note 15 (noting that for many disabled people, not having access to a plastic straw means they cannot drink because the paper straw alternatives “are not temperature safe, often dissolve in water and can become a choking hazard”).

61. Danovich & Godoy, *supra* note 41.

62. See *id.* (describing flexibility as one of the most important features of plastic straws for people with mobility challenges); *Food Service: Accommodating Diners with Disabilities*, ADA NAT’L NETWORK (2017), <https://adata.org/factsheet/food-service> [<https://perma.cc/YHF7-7B2R>] (noting that some people with disabilities have difficulty lifting or holding glasses up to their mouths, and need bendable straws).

63. See Danovich & Godoy, *supra* note 41 (noting that reusable straws are not a suitable option for disabled people because they need to be washed, which is not easy for some people with disabilities); Hellmann, *supra* note 41 (“Requiring people with disabilities to treat a routine fast-food trip as something that requires planning and supplies is an unplanned failure in equity, when these restaurants could just as easily offer them upon request to individuals who need them.” (internal quotations omitted)); Hitselberger, *supra* note 15 (“The inevitable questions—‘Why don’t you bring your own straws?’ ‘Why don’t you use a metal straw?’—miss the larger point. This isn’t about straws. It’s about access.”); Alice Wong, *The Last Straw*, EATER (July 19, 2018, 10:04 AM), <https://www.eater.com/2018/7/19/17586742/plastic-straw-ban-disabilities> [<https://perma.cc/GS87-TRYF?type=image>] (describing the disparate experience of asking disabled people to bring their own straws to enjoy something that a non-disabled person get to enjoy without for free with convenience).

64. See Danovich & Godoy, *supra* note 41 (noting metal and glass straws’ tendency to conduct heat and cold pose a safety risk).

65. See Hellmann, *supra* note 41 (stating that bamboo and metal straws are not suitable alternatives because unintentionally biting on them can cause injury); *Food Service: Accommodating Diners with Disabilities*, *supra* note 62 (recommending flexible straws).

66. See Karin Willison, *Disposable Plastic Straws Suck. Try These Disability-Friendly Alternatives*, THE MIGHTY (May 25, 2018), <https://themighty.com/2018/05/review-reusable-drinking-straws-disability> [<https://perma.cc/UJN4-AAE8>] (reviewing the available plastic straw alternatives from both an environmental and disabled person perspective).

B. *The Americans with Disabilities Act*

Organizations for people with disabilities have existed since the 1800s but became more prevalent and popular in the 1900s.⁶⁷ By the 1960s, the advancement of medicine and the increase in disabled veterans coming from World War II and the Korean War helped propel the disability rights movement forward while, on the national stage, President Kennedy championed legislation to address intellectual disabilities.⁶⁸ Around this time, the Civil Rights Acts laid the foundation for recognizing the rights of people with disabilities.⁶⁹ This led to the passage of some targeted legislation, such as the Rehabilitation Act of 1973, which provided some protections for those with severe disabilities and established disability research and training programs.⁷⁰ On July 26, 1990, President George H.W. Bush signed into law the Americans with Disabilities Act.⁷¹ The law sought to remedy the discriminatory treatment of disabled people in hiring as well as in both public and private accommodations.⁷²

67. Perri Meldon, *Disability History: The Disability Rights Movement*, NAT'L PARK SERV., <https://www.nps.gov/articles/disabilityhistoryrightsmovement.htm> [<https://perma.cc/VKA2-JAFA>] (last updated Dec. 1, 2017) (attributing the boom of organizations for people with disabilities due to assistance from various presidents and the Americans with Disabilities Act of 1990).

68. *John F. Kennedy and People with Intellectual Disabilities*, JFK LIBR., <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/john-f-kennedy-and-people-with-intellectual-disabilities> [<https://perma.cc/B6HN-8AXY>] (noting intellectual disabilities were a priority in the Kennedy administration, creating a panel to address the issue); see also Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITIES RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada> [<https://perma.cc/ZQZ6-FCS2>] (recounting the drafting history of the ADA); *ADA—Findings, Purpose, and History*, ADA ANNIVERSARY (2019), https://www.adaanniversary.org/findings_purpose [<https://perma.cc/6NZS-YQZZ>] (documenting the history of disability rights activism leading up to the ADA and the drafting of the ADA itself).

69. Mayerson, *supra* note 68; Meldon, *supra* note 67.

70. See 29 U.S.C. § 701 (2012).

71. 42 U.S.C. §§ 12101–213 (2012); *Introduction to the ADA*, U.S. DEP'T OF JUST. C.R. Div., https://www.ada.gov/ada_intro.htm [<https://perma.cc/2YEC-4MVL>]; see also Elizabeth A. Mapelli, Comment, *Inadequate Accessibility: Why Uber Should Be a Public Accommodation Under the Americans with Disabilities Act*, 67 AM. U. L. REV. 1947, 1963–66 (2018) (providing a concise history of the passing of the ADA); Mayerson, *supra* note 68 (recounting the formulation of the ADA).

72. See Mapelli, *supra* note 71, at 1965–66 (“The primary purpose of the ADA is to eliminate discrimination against the 56.7 million Americans—nearly one in five individuals or nineteen percent of the noninstitutionalized population—who have disabilities.”); *Introduction to the ADA*, *supra* note 71 (arguing that the purpose of the ADA is to guarantee that “people with disabilities have the same opportunities as

1. *Title III—people with disabilities and public accommodations*

Title III of the ADA focuses on discrimination in public accommodations.⁷³ The Public Accommodations section of the ADA catalogs which businesses may be considered public accommodations, and subsection (B) explicitly lists “a restaurant, bar, or other establishment serving food or drink.”⁷⁴ In spite of some resistance early on, the government has asserted that Title III is a valid exercise of Congress’s Commerce Clause power,⁷⁵ and courts have agreed.⁷⁶

a. *Public accommodations*

Title III of the ADA makes clear in its definitions that it applies to most private businesses that provide food.⁷⁷ These include: hotels and inns, restaurants, bars, or “other establishments serving food or drink”; schools and nurseries, places of exhibition, entertainment, exercise or recreation; social service centers like daycare or senior living facilities; stores that sell food; and food banks.⁷⁸ Public and religious entities, however, are not required to comply with Title III of the ADA.⁷⁹

In numerous cases, courts have recognized a whole host of venues to count as public accommodations under Title III.⁸⁰ ADA litigation has reached many restaurants and food service providers such as a Steak ‘N

everyone else to . . . enjoy employment opportunities, to purchase goods and services, and to participate in State and local government programs and services”).

73. 42 U.S.C. §§ 12181–89.

74. § 12181(7)(B).

75. See United States’ Memorandum in Support of Its Cross-Motion for Summary Judgment and in Opposition to Defendant’s Motion for Summary Judgment at 11–12, *Pinnock v. Int’l House of Pancakes Franchisee*, No. 92-1370-R (S.D. Cal. Sept. 7, 1993).

76. See *Pinnock v. Int’l House of Pancakes Franchisee*, 844 F. Supp. 574, 589–90 (S.D. Cal. 1993) (holding that the provision of the ADA requiring public accommodations to make “reasonable modifications” for the disabled is constitutional).

77. 42 U.S.C. § 12181(7)(B).

78. § 12181(7); Americans with Disabilities Act Title III Regulations, 28 C.F.R. § 36.104 (2018).

79. 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104.

80. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 679–80 (2001) (golf tournament at a golf course); *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1008 (9th Cir. 2017) (car dealership); *Fortyone v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1078 (9th Cir. 2004) (cinema); *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1055 (5th Cir. 1997) (brewery); *Cupolo-Freeman v. Hosp. Props. Tr.*, No. 15-cv-00221-JST, 2019 WL 935134, at *5–6 (N.D. Cal. Feb. 26, 2019) (hotel); *Alumni Cruises, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290, 1304 (S.D. Fla. 2013) (cruise ship); *Ass’n for Disabled Ams. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1360 (S.D. Fla. 2001) (cruise ship); *Indep. Living Res. v. Or. Arena Corp.*, 1 F. Supp. 2d 1159, 1170 (D. Or. 1998) (arena).

Shake;⁸¹ a McDonalds;⁸² an L & L restaurant;⁸³ a Denny's;⁸⁴ and an International House of Pancakes.⁸⁵ Because of the comprehensive regulatory scheme of the ADA, the statute clearly defines "public accommodation" and enables consistent application by the courts.⁸⁶ Detailed analysis is not usually given; courts will frequently simply cite to the subsection of the law that defines the place in question or declare the place in question to be a public accommodation.⁸⁷

b. What constitutes a disability

The more contentious issue found in ADA litigation is whether a particular impairment rises to the level of a "disability." The Supreme Court initially defined 'disability' narrowly in *Sutton v. United Airlines*,⁸⁸ *Murphy v. United Parcel Service*,⁸⁹ *Albertson's Inc. v. Kirkinburg*,⁹⁰ and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.⁹¹ Congress subsequently adopted

81. *Mielo v. Steak 'N Shake Operations, Inc.*, 897 F.3d 467, 475 (3d Cir. 2018).

82. *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 202 (D.N.J. 2003).

83. *Emerick v. Kahala L & L, Inc.*, No. 97-01174 FIY, 2000 WL 687662, at *2, *24 (D. Haw. 2000) (holding that Kahala L & L restaurant, a fast food franchised restaurant located in a shopping mall, is a public accommodation within the purview of the ADA).

84. *Guzman v. Denny's Inc.*, 40 F. Supp. 2d 930, 932 (S.D. Ohio 1999).

85. *Pinnock v. Int'l House of Pancakes Franchisee*, 844 F. Supp. 574, 578 (S.D. Cal. 1993).

86. 42 U.S.C. § 12181(7) (2012); 28 C.F.R. § 36.104 (2018).

87. *See, e.g., Mielo v. Steak 'N Shake Operations, Inc.*, 897 F.3d 467, 475 n.4 (3d Cir. 2018) ("Steak 'n Shake restaurants qualify as places of public accommodation." (citing 42 U.S.C. § 12181(7)(B))); *Clark*, 213 F.R.D. at 202 ("The fast food restaurants owned and operated by Defendants McDonald's Corporation ('McDonald's') and its franchisee Ygraine, LLC ('Ygraine') are places of public accommodation . . ."); *Pinnock*, 844 F. Supp. at 579 ("As a member of the restaurant industry and as an individual enterprise which caters to travelers, Zahedi's restaurant is properly regulated by title III of the ADA.").

88. 527 U.S. 471, 484 (1999) ("[F]indings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities. Congress found that some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing . . ." (internal quotations omitted)).

89. 527 U.S. 516, 523 (1999) (holding that in order for an impairment to be considered a disability it must preclude you from working more than one particular job).

90. 527 U.S. 555, 566–67 (1999) (holding that monocularly may cause substantial impairment, but it must be determined on a case-by-case basis).

91. 534 U.S. 184, 195, 198 (2002) ("Merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity . . . a claimant must further show that the limitation on the major life activity is substantial . . . [T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely

legislation in 2008 to broaden this understanding.⁹² This congressional enactment made clear that the ADA should define as “disabled” people who have “a physical or mental impairment that substantially limits one or more major life activities of such individual; . . . a record of such an impairment; or . . . [are] regarded as having such an impairment.”⁹³ Further, the ADA explicitly states that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”⁹⁴

Courts have historically given broad deference in their ADA analysis when individuals have readily apparent injuries such as spinal injuries, quadriplegics, and other wheelchair-using individuals.⁹⁵ This has also been the situation in cases such as *Castelan v. Universal Studios Inc.*,⁹⁶ where one individual lacked arms and the other lacked legs.⁹⁷ But courts have also recognized many other types of disabilities, such as those who merely have trouble using their limbs for an extended period. In *PGA Tour, Inc. v. Martin*,⁹⁸ where the plaintiff suffered from a degenerative circulatory disorder, the court noted the disease caused “pain, fatigue, and anxiety” while walking as well as “a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required.”⁹⁹ Cerebral palsy has also qualified as a disability depending on

restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long-term.”).

92. See ADA Amendments Act of 2008, H.R. 3195, 110th Cong. § 2(a)(3) (2008); ADA Amendment Acts of 2008, Cong. Rec. H6058 (daily ed. June 25, 2008) (stating that the purpose of the act is to “respond to certain decisions of the Supreme Court . . . that have narrowed the class of people who can invoke the protection from discrimination the ADA provides” and “to reinstate original congressional intent regarding the definition of disability by clarifying that ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived impairment”).

93. 42 U.S.C. § 12102(1) (2012).

94. § 12102(4)(A).

95. See *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1078 (9th Cir. 2004) (granting summary judgment to a quadriplegic patron alleging discrimination in a movie theatre); *Guzman v. Denny’s Inc.*, 40 F. Supp. 2d 930, 931 (S.D. Ohio 1999) (denying summary judgment to a paraplegic patron alleging the bathrooms in a restaurant were inaccessible); *Pinnock v. Int’l House of Pancakes Franchisee*, 844 F. Supp. 574, 578 (S.D. Cal. 1993) (holding that failing to provide bathroom ramps that are accessible to patrons in wheelchairs is a violation of the ADA).

96. CV 12-05481 BRO (AGRx), 2014 WL 210754 (C.D. Cal. Jan. 10, 2014).

97. *Id.* at *1 (“Plaintiffs are two individuals with disabilities as defined by the Act: one has no arms or hands; the other has no legs.”).

98. 532 U.S. 661 (2001).

99. *Id.* at 668.

the circumstances.¹⁰⁰ Other situations in which courts will analyze the severity of the affliction include when somebody suffers from amyotrophic lateral sclerosis (ALS)¹⁰¹ and when somebody suffers from multiple sclerosis.¹⁰² Despite having a narrow definition of a disability at the time, the parties in many of these cases did not contend the existence of the disability in court. With the passage of the more encompassing ADA amendment in 2008, courts have taken an increasingly expansive view of what constitutes a disability.¹⁰³ However, given the broader understanding of disability and the fact that many businesses were not willing to challenge the issue, it is likely the individuals in these cases would easily qualify as disabled today. Furthermore, it is not always enough that a person be diagnosed with one of these health concerns; courts also require a showing that the disability affects the person's life.¹⁰⁴

100. Compare *Wright v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 831 F.3d 64, 69, 72 (2d Cir. 2016) (finding that a person only able to walk short distances with the aid of a cane due to cerebral palsy and scoliosis clearly qualifies as disabled) with *Brady v. Wal-Mart Stores*, 455 F. Supp. 2d 157, 166–68 (E.D.N.Y. 2006) (analyzing a contention that a defendant with cerebral palsy, which affected his ability to walk, speak, and see, was not disabled and concluding he could have been “easily” found by a jury to be substantially limited in major life activities).

101. *Kiman v. N.H. Dep't of Corr.*, No. 01-cv-134-JD, 2008 WL 649128, at *5 (D.N.H. Mar. 10, 2008) (“With respect to a preliminary instruction about Kiman’s illness, the DOC does not dispute that Kiman was disabled during the time in question.”).

102. *Braunling v. Countrywide Home Loans, Inc.*, 220 F.3d 1154, 1155, 1157 (9th Cir. 2000) (finding that a person who suffers from Multiple Sclerosis, which caused “extreme fatigue, dizziness, sensitivity to light, heat, humidity and stress . . . prevents Braunling from walking extensively” as well as prevents her from “put[ting] in overtime at work . . . [or] taking work home” clearly fit the definition of disabled under the ADA); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1174–75 (10th Cir. 1999) (holding that a plaintiff who “suffers from multiple sclerosis (MS) [and as a result has] numbness, pain, fatigue, cramps, blurred vision, fainting spells, forgetfulness, loss of balance and incontinence . . . [which] limits, among other things, her ability to lift heavy objects, work in a hot environment and stand for long periods of time” qualifies as disabled within the meaning of the ADA); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 785–86 (8th Cir. 1998) (“Moritz was diagnosed with multiple sclerosis in 1990 There appears to be no dispute that Moritz, as a result of her confirmed diagnosis of multiple sclerosis, is considered a person with a disability within the meaning of the ADA.”).

103. See *supra* note 92 and accompanying text.

104. See, e.g., *Fralick v. Ford*, No. 2:12-cv-1210-EJF, 2014 WL 971719, at *1 (D. Utah Mar. 12, 2014) (holding that a diagnosis of multiple sclerosis alone does not constitute a disability); *McKenzie v. Target Stores*, No. 3:95-2787-23, 1998 WL 1048361, at *5 (D.S.C. June 24, 1998) (asserting that a diagnosis of cerebral palsy is not considered a disability if it does not “significantly hinder[] . . . her ability to hold a wide range or class of jobs”).

2. *Title III provisions—denial of service, full and equal enjoyment, and reasonable modifications*

The ADA provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services . . . of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”¹⁰⁵ Further, the law states:

[i]t shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, . . . or accommodations of an entity.¹⁰⁶

Denials of opportunity can include the physical prevention from entering a store because of architectural barriers, as in *Betancourt v. Ingram Park Mall, L.P.*,¹⁰⁷ where a wheelchair-using individual could not access a mall.¹⁰⁸ It may be the prevention from a service, as in the inability to use a website to shop,¹⁰⁹ or refusal to perform a service, as when a dentist refuses to treat an HIV-positive patient.¹¹⁰ Even offering to still provide the service, but restricting a person with disabilities to a more limited provision of that service, can be denial of service. This was the case in *Davis v. Seven Oaks Medical Group*,¹¹¹ where a woman who used a service animal was restricted to only having 4:00 p.m. appointments because of her service dog.¹¹²

In addition to provisions asserting the right of full and equal enjoyment, § 12182(b)(2)(A)(ii) of the ADA requires public accommodations “to make reasonable modifications in policies,

105. 42 U.S.C. § 12182(a) (2012).

106. § 12182(b)(1)(A)(i).

107. 735 F. Supp. 2d 587 (W.D. Tex. 2010).

108. *Id.* at 602 (finding that some courts “have appropriately held that the Title III injury includes” both the direct interaction with architectural barriers or other Title III violations, as well as “the deterrent effect that [those violations] have on the plaintiff,” where the injury is “the denial of opportunity to participate in or benefit from the goods, services,” or other privileges of an entity).

109. *Nat’l Fed’n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1188–89 (N.D. Cal. 2007).

110. *Bragdon v. Abbott*, 524 U.S. 624, 629 (1998) (explaining that a dentist “completed a dental examination, discovered a cavity, and informed [a patient] of his policy against filling cavities of HIV-infected patients”).

111. No. 1:14-CV-00669-LJO-JLT, 2014 WL 3966295 (E.D. Cal. Aug. 8, 2014).

112. *Id.* at *1.

practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities”¹¹³ Courts have recognized that modest shifts in corporate policy may be all that is necessary for a reasonable modification. In *Fortyune v. American Multi-Cinema, Inc.*,¹¹⁴ the court required that a movie theater change its policies to grant priority in seating to the companion of a wheelchair-using person with regard to the seats near the wheelchair seating area.¹¹⁵ Similarly, in *Independent Living Resources v. Oregon Arena Corp.*,¹¹⁶ the court required an arena to adjust its ticket-sale policies to give priority to disabled patrons who actually require the arena’s modified aisle seats over those who do not need the modified seats.¹¹⁷ In *Johnson v. Gambrinus Company/Spoetzl Brewery*,¹¹⁸ a brewery was required to modify its “no animals” policy to allow for guide dogs on tours, despite objections that the tour route would have to be changed to prevent contamination.¹¹⁹ In *Alumni Cruises, LLC v. Carnival Corp.*,¹²⁰ the court denied summary judgment in favor of Carnival Cruises on numerous counts forcing policy changes; however, the court granted summary judgment for one count and required a Carnival staff member to accompany every disabled individual on port excursions.¹²¹ These policies included staff training on developmental disabilities, expedited food service and window seats for families with developmentally disabled students, embarkation and disembarkation priorities, and private opportunities to use venues and have photos taken.¹²²

In addition to modifying policies, courts have found the inclusion of particular tools or devices to assist disabled people to be reasonable modifications. In *Martin*, the Supreme Court held it was a reasonable modification of the Professional Golf Association’s tournaments to

113. 42 U.S.C. § 12182(b)(2)(A)(ii) (2012); *see also* 28 C.F.R. § 36.302 (2018) (providing guidance on policy modifications, including specific guidance necessary for services and areas such as check-out aisles, ticketing, and service animals).

114. 364 F.3d 1075 (9th Cir. 2004).

115. *See id.* at 1087.

116. 1 F. Supp. 2d 1159 (D. Or. 1998).

117. *See id.* at 1172–73.

118. 116 F.3d 1052 (5th Cir. 1997).

119. *See id.* at 1065 (finding that a “guide dog could be present without a likelihood of contamination” and requiring the brewery to submit a plan for court approval that would provide “the broadest feasible access consistent with the safe operation” of the brewery).

120. 987 F. Supp. 2d 1290 (S.D. Fla. 2013).

121. *See id.* at 1315, 1318–19.

122. *See id.* at 1306, 1310, 1312–15.

allow a disabled individual who gets quickly fatigued to use a golf cart, although the tournament generally required that participants walk from hole to hole.¹²³ The Court considered the furnishing of a golf cart to be a reasonable modification.¹²⁴ Explicitly, the Court observed “that the use of carts is not itself inconsistent with the fundamental character of the game of golf.”¹²⁵

Similarly, in *Karczewski v. DCH Mission Valley, LLC*,¹²⁶ the Ninth Circuit reasoned that provision and installation of a hand control at a car dealership, which would allow a disabled person who does not have the use of his or her feet to test drive a car, could be a reasonable modification and not necessarily an undue burden.¹²⁷ Although the court remanded the case to establish whether a provision of the hand device may ultimately prove to be unreasonable for that particular dealership, it made several findings important to the furnishing of particular goods.¹²⁸ Importantly, the court ruled the claim was not barred under regulations stating that a public accommodation is not required to furnish “personal devices”¹²⁹ or “to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.”¹³⁰ Summarizing the district court in the case of *Funches v. Barra*,¹³¹ the Ninth Circuit stated that businesses “are required to make reasonable, temporary adjustments to goods already in stock if doing so will help disabled customers access the same goods and services as non-disabled customers.”¹³² Additionally, the court reasoned that because one regulation forbids personal devices, and another nearby regulation requires them,¹³³ the regulation should be read narrowly to include the type of general use items it names, like wheelchairs, and to not include personal devices that would be reasonable for the business to carry.¹³⁴ Thus, businesses may be required to furnish special goods if doing so is reasonable in light of their business and not overly burdensome. These reasonable accommodations in some cases may require some cost in the ordering of special parts, devices, or training.

123. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690–91 (2001).

124. *Id.* at 682–83.

125. *Id.* at 683.

126. 862 F.3d 1006 (9th Cir. 2017).

127. See *id.* at 1017.

128. See *id.* at 1011.

129. *Id.* at 1014; see also 28 C.F.R. § 36.306 (2018).

130. *Karczewski*, 862 F.3d at 1017; see also 28 C.F.R. 36.307 (2018).

131. No. 14 Civ. 7382 (KPF), 2016 WL 2939165 (S.D.N.Y. May 17, 2016).

132. *Karczewski*, 862 F.3d at 1014–15 (quoting *Funches*, 2016 WL 2939165, at *6).

133. 28 C.F.R. § 36.303.

134. See *Karczewski*, 862 F.3d at 1016–17.

When accommodations are unreasonable or not readily achievable—an ‘undue burden’—a court will find no violation of the ADA. In *Association for Disabled Americans, Inc. v. Concorde Gaming Corp.*,¹³⁵ a wheelchair-using plaintiff was not successful in alleging ADA violations against a cruise ship.¹³⁶ The court found that lowering a cashier counter was unreasonable because it was a certain height for security purposes.¹³⁷ The court additionally found that it would be unreasonable to permit the plaintiff to sit where the craps game attendants stand or lower the craps railing as this would fundamentally alter the nature of the game.¹³⁸ The plaintiff also did not satisfactorily demonstrate that the handicap bathroom had a clearance issue.¹³⁹ Further, the court found that the installation of an elevator to the other decks would be “extremely difficult and expensive” and thus was not readily achievable,¹⁴⁰ while installing a grab bar, moving and lowering the mirror and toilet paper dispenser, and lowering the coat hooks in the handicap-accessible bathroom would be reasonable.¹⁴¹ In *Larsen v. Carnival Corp.*,¹⁴² the court found that it was not a violation of the ADA for a cruise ship to require a disabled plaintiff and his companion to check his Bi-Pap with a porter instead of carrying it themselves because it was not necessary they carry it up the ramp.¹⁴³ Additionally, the cruise ship was not required to wait for a replacement for the broken Bi-Pap because waiting indefinitely would be a fundamental alteration of the service.¹⁴⁴ The court found that the cruise ship had reasonable medical and safety concerns regarding the plaintiff so their decision to disembark the plaintiff was not an ADA violation.¹⁴⁵

Courts will also find that a “direct threat” defense to alleged ADA violations is appropriate when there are medical or safety concerns for other individuals. This was the case in *Montalvo v. Radcliffe*,¹⁴⁶ where the Fourth Circuit ruled that a child with AIDS did not have an ADA claim when he was precluded from participating in group karate

135. 158 F. Supp. 2d 1353 (S.D. Fla. 2001).

136. *See id.* at 1369.

137. *Id.* at 1365–66.

138. *Id.* at 1366–67.

139. *Id.* at 1368–69.

140. *Id.* at 1365.

141. *Id.* at 1368.

142. 242 F. Supp. 2d 1333 (S.D. Fla. 2003).

143. *Id.* at 1343–44.

144. *Id.* at 1344.

145. *Id.* at 1347–48.

146. 167 F.3d 873 (4th Cir. 1999).

classes and offered single classes instead.¹⁴⁷ The court highlighted that “[r]ecognizing that the need to protect public health may at times outweigh the rights of disabled individuals, Congress created a narrow exception to this broad prohibition against discrimination based on disability in places of public accommodation.”¹⁴⁸

Courts appear reluctant to find modifications to policies or provisions of particular devices to be reasonable when they significantly alter the nature of the service. Additionally, if the policy modification or the device is prohibitively expensive, it is not likely to be reasonable. Lastly, if there is a significant rationale for not modifying the policy or providing the device, such as for safety or medical reasons for either the disabled individual or others, it is not likely to be reasonable.¹⁴⁹

3. *Straws and the ADA*

The ADA does not contain explicit references to straws; however, there has been guidance relating to the need for straws elsewhere. Given the ubiquity of straws and their general automatic inclusion in beverage orders, it is no surprise that the issue has yet to be heavily litigated. But while no court has ruled directly on this issue yet, there has been at least one ADA complaint: a man with a fused neck was not able to drink his beverage at a Florida restaurant due to its “no straws” policy.¹⁵⁰ The case settled, and the restaurant agreed to modify its “no straws” policy, train its staff on the policy, and pay \$500 in damages to the man.¹⁵¹ Additionally, the importance of straws for persons with disabilities has received recognition from the U.S. Department of Justice and the ADA National Network. On its website on ADA compliance, the U.S. Department of Justice Civil Rights Division advises businesses to have straws at refreshment tables during business meetings.¹⁵² Further, in its advice to restaurants on ADA compliance, the Mid-Atlantic ADA Center

147. *Id.* at 876.

148. *Id.*

149. See generally Kari L. Rutherford, Note, *The Americans with Disabilities Act (ADA); Title III: “What Is Readily Achievable?”*, 22 W. ST. U. L. REV. 329, 336–44 (1995) (providing an overview of what is considered “readily achievable” under the ADA).

150. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE APRIL-SEPTEMBER 2009 11 (2009), <https://www.ada.gov/aprsep09.pdf> [<https://perma.cc/JL6Y-YR9M>].

151. *Id.*

152. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., ACCESSIBLE INFORMATION EXCHANGE: MEETING ON A LEVEL PLAYING FIELD 3 (2009) <https://www.ada.gov/business/accessiblemtg.pdf> [<https://perma.cc/F934-VNKX>].

states: “Offer straws: Some people with disabilities find it difficult to lift or hold glasses, cups, or other beverage containers. Providing straws, *especially the type that bends*, will be appreciated.”¹⁵³

As straw ban legislation was enacted, concerns of disabled individuals and their advocates compelled some policymakers to adjust their approach to better accommodate persons with disabilities.¹⁵⁴ These concerns have also been highlighted during the passage of these bills, either in public comment¹⁵⁵ or by government offices tasked with disability concerns.¹⁵⁶ In some cases, this has resulted in meaningful change. The San Francisco Department of the Environment writes:

Per Title III of the Americans with Disabilities Act (ADA) and California state law, businesses in San Francisco are expected to provide reasonable access to goods and services. Disability advocates say that it is best practice for places of public accommodation to have some plastic straws available in order to ensure reasonable access to goods and services. Businesses should wait for a customer to request a plastic straw before providing one and should not assume that all people with disabilities require a plastic straw.¹⁵⁷

Likewise, as D.C. was passing its straw ban law, the Director for the D.C. Office of Disability Rights testified that:

153. *Food Service: Accommodating Diners with Disabilities*, *supra* note 62 (emphasis added).

154. See Danovich & Godoy, *supra* note 41; Hitselberger, *supra* note 15; Benjamin Oreskes & Shelby Grad, *Essential California: One Problem with L.A.’s Potential Plastic Straw Ban*, L.A. TIMES (Dec. 5, 2018, 5:30 AM), <https://www.latimes.com/newsletters/la-me-ln-essential-california-20181205-story.html> [<https://perma.cc/6PJN-QYU3>].

155. See, e.g., DEREK JOHNSON, CITY OF SAN LUIS OBISPO COUNCIL AGENDA REPORT: REVIEW OF BEVERAGE STRAWS UPON REQUEST ORDINANCE 208 (2017), <http://opengov.slocity.org/WebLink/DocView.aspx?dbid=1&id=68652&page=1&cr=1> [<https://perma.cc/LF6E-WDL3>] (documenting a public comment from an unnamed person: “Yes! I would say to disallow them unless required for accessibility, but I suppose this is a good first step. You could also consider requiring restaurants to provide only paper straws upon request for single use and reuseable [sic] for within restaurants.”).

156. See D.C. OFFICE OF DISABILITY RIGHTS, B22-902, THE SUSTAINABLE STRAWS AND STIRRERS AMENDMENT ACT OF 2018: TESTIMONY OF MATHEW MCCOLLOUGH 2–3 (2018) https://odr.dc.gov/sites/default/files/dc/sites/odr/release_content/attachments/ODR_B22-902_SustainableStraws_Testimony_2018_Final.docx [<https://perma.cc/CZS4-8PNF>]; *New Ordinance Tackles Plastic Waste and Litter, Makes Dining in San Francisco More Eco-Friendly*, S.F. DEP’T OF THE ENV’T, <https://sfenvironment.org/news/update/the-plastic-and-litter-reduction-ordinance-will-eliminate-sources-of-litter-while-making-the-san-francisco-dining-experience-more> [<https://perma.cc/4AFS-49S8>] (last updated July 3, 2019) [hereinafter *New Ordinance Tackles Plastic*].

157. *New Ordinance Tackles Plastic*, *supra* note 156.

[T]he Office of Disability Rights recommends that food service entities keep a small supply of plastic straws in stock and available upon request for those patrons with medical necessity. This recommendation allows all D.C. businesses selling beverages *to meet their legal obligations* in offering appropriate “public accommodations” *under Title III of the Americans with Disabilities Act*.¹⁵⁸

Unfortunately, these recommendations have not always resulted in specifically codified accessibility exceptions.¹⁵⁹

II. ANALYSIS

In recent years, states, cities, and companies have adopted laws and policies to combat the growing plastic crisis, including bans or other restrictions on single-use plastic straws. Additionally, Congress has passed comprehensive legislation—the Americans with Disabilities Act—intended to protect individuals with disabilities from discrimination and to help facilitate their participation in the public sphere, such as in public accommodations like restaurants. Using the standards set by the ADA outlined above, this Section examines the various straw ban policies and statutes, identifying when they do and when they do not violate the ADA.

The businesses affected for the most part count as public accommodations. Many of the people affected would qualify as disabled. Not providing plastic straws is a denial of service or a denial of the full and equal enjoyment of the services and goods which public accommodations that serve drinks provide. Supplying plastic straws is a reasonable modification to a business’s practices and policies.

A. *Businesses Affected by Plastic Straw Bans Qualify as Public Accommodations under Title III*

The ADA explicitly lists multiple places to be considered public accommodations, including: “a restaurant, bar, or other establishment serving food or drink”;¹⁶⁰ “an inn, hotel, motel, or other place of lodging”;¹⁶¹ “a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment”;¹⁶² “[a] shopping center, or other sales or rental establishment.”¹⁶³ Further, courts regularly recognize

158. D.C. OFFICE OF DISABILITY RIGHTS, *supra* note 156 (emphasis added).

159. *See, e.g.*, D.C. CODE §§ 8-1531 to -1534, -1537 (2019) (although D.C. offers guidance on its website for restaurants to keep plastic straws, this is not codified within the statute).

160. 42 U.S.C. § 12181(7)(B) (2012).

161. § 12181(7)(A).

162. § 12181(7)(C).

163. § 12181(7)(E).

these places as public accommodations.¹⁶⁴ Restaurants and bars, however, are not only common targets for ADA litigation,¹⁶⁵ but also more likely than most public accommodations to carry straws.¹⁶⁶ Indeed, considering one of the primary services of restaurants and bars centers around serving liquids, straws are more necessary for these accommodations to ensure the full and equal enjoyment of their goods and services.

Many of the straw ban laws specifically target these very types of establishments, and most of the companies that have adopted these policies are one of these kinds of public accommodations. For example, Malibu, California's ordinance states "[n]o restaurant, including fast food restaurants, beverage provider, or vendor" shall sell plastic straws;¹⁶⁷

164. See, e.g., *Mielo v. Steak 'N Shake Operations, Inc.*, 897 F.3d 467, 475 n.4 (3d Cir. 2018) (stating that "Steak 'n Shake restaurants qualify as places of public accommodation" (citing 42 U.S.C. § 12181(7)(B))); *Fortyone v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004) (noting that "no party disputes that Fortyone is disabled or that AMC is a place of public accommodation"); *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1057 n.3 (5th Cir. 1997) ("The parties do not dispute that the public tour and hospitality room are places of public accommodation."); *Cupolo-Freeman v. Hosp. Props. Tr.*, No. 15-cv-00221-JST 2019 WL 935134, at *2 (N.D. Cal. Feb. 26, 2019) (holding that "[a] hotel is a public accommodation" (citing 42 U.S.C. § 12181(7)(A))); *Castelan v. Universal Studios Inc.*, No. CV 12-05481 BRO (AGRx), 2014 WL 210754, at *5 n.6 (C.D. Cal. 2014) (finding that the statute's specific mention of amusement parks renders "Universal Studios theme park . . . indisputably a place of public accommodation" (citing 42 U.S.C. § 12181(7)(I))); *Betancourt v. Ingram Park Mall, L.P.*, 735 F. Supp. 2d 587, 594 (W.D. Tex. 2010) ("Title III of the ADA prohibits discrimination against persons with disabilities by places of public accommodation and services operated by private entities, including retail establishments.").

165. See, e.g., *Mielo*, 897 F.3d at 473 (noting that disability rights advocates were suing a Steak 'n Shake restaurant); *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 202 (D.N.J. 2003) (finding McDonald's fast food restaurants were places of public accommodation); *Emerick v. Kahala L & L, Inc.*, No. Civ. 97-01174 FIY 2000 WL 687662, at *4 (D. Haw. May 16, 2000) (acknowledging that Kahala L&L restaurant was a place of public accommodation and the defendant in the suit); *Guzman v. Denny's Inc.*, 40 F. Supp. 2d 930, 932 (S.D. Ohio 1999) (noting that Denny's is the target of the ADA litigation); *Pinnock v. Int'l House of Pancakes Franchisee*, 844 F. Supp. 574, 578 (S.D. Cal. 1993) (indicating that the International House of Pancakes is a place of public accommodation).

166. See Abha Bhattarai, *Paper, Bamboo, Twizzlers: Restaurants Consider Alternatives to the Plastic Straw*, WASH. POST (Feb. 2, 2018), <https://www.washingtonpost.com/business/economy/paper-bamboo-twizzlers-restaurants-consider-alternatives-to-the-plastic-straw/2018/02/02/9be47608-02ab-11e8-8acf-ad2991367d9d>; Jonathan Maze, *Restaurants Scramble to Find a New Straw*, RESTAURANT BUS. (July 18, 2018), <https://www.restaurantbusinessonline.com/operations/restaurants-scramble-find-new-straw> [https://perma.cc/56CK-WBXC].

167. MALIBU, CAL., MUN. CODE § 9.24.045 (2018).

Washington, D.C.'s says "no food service entity";¹⁶⁸ Richmond, California states "[n]o retail establishment, food provider, or transient lodging establishment";¹⁶⁹ Monmouth Beach, New Jersey states "[n]o business or store";¹⁷⁰ and Fort Myers Beach, Florida goes as far to say "no person."¹⁷¹ While the majority of these laws target restaurants and food retailers,¹⁷² insofar as these laws go beyond public accommodations and affect religious institutions¹⁷³ or other private entities,¹⁷⁴ their provisions would not violate the ADA. However, this overly inclusive language does not prevent these provisions from still applying to a host of establishments traditionally considered to be public accommodations. Further, many of the businesses that have voluntarily established plastic straw ban policies fall under the umbrella of public accommodations as described above. These include many beverage providers such as Joe Coffee, Starbucks, and Intelligentsia Coffee; hotels like the Four Seasons, Hilton, and Marriott; restaurants like Fox Restaurant Concepts, Shake Shack, and Eataly; and places of public entertainment like SeaWorld, Disney amusement parks, and the White Sox's home field.¹⁷⁵ Thus, most businesses considering plastic straw ban policies are subject to ADA regulation.

168. D.C. CODE § 8-1532 (2019).

169. RICHMOND, CAL., MUN. CODE § 9.17.025(b) (2018).

170. MONMOUTH BEACH, N.J., BOROUGH CODE § 3-17.3 (2019).

171. FORT MYERS BEACH, FLA., CODE OF ORDINANCES No. 17-13 (2018).

172. *See, e.g.*, MANHATTAN BEACH, CAL., CODE OF ORDINANCES § 5.80.037 (2018) ("Food providers shall not use or distribute plastic beverage straws, plastic stirrers or plastic utensils, whether for use on-site, to-go, or delivery. Disposable straws, stirrers, and utensils must be non-plastic, made from non-plastic materials, such as paper, pasta, sugar cane, wood, or bamboo."); SANTA BARBARA, CAL., MUN. CODE § 9.165.030(A) (2018) ("It is unlawful for any food provider or beverage provider to use plastic beverage straws or stirrers, or to provide, distribute, or sell plastic beverage straws or stirrers to any person."); SEATTLE, WASH., MUN. CODE § 21.36.086(A) (2019) ("[F]ood service businesses shall be prohibited from selling or providing food, for consumption on or off the premises, in or with disposable food service ware.").

173. *See* 28 C.F.R. § 36.102(e) (2018) ("This part does not apply to . . . any religious entity . . ."). Thus, laws such as D.C.'s which purport to affect churches would not fall under the ADA. *See Food Service Ware, supra* note 7 ("These regulations apply to all food service ware products used to serve consumers. Examples of regulated entities include, but are not limited to: . . . [c]hurches that offer coffee or food to parishioners after a service.").

174. *See* 28 C.F.R. § 36.102(e) ("This part does not apply to any private club (except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation) . . ."). Thus, insofar as some laws seek to affect all businesses or persons, they would not be violative of the ADA when those entities fall outside the scope of Title III public accommodations.

175. Bratskeir, *supra* note 35; Langone, *supra* note 12.

B. People Affected by Plastic Straw Bans Qualify as Disabled under Title III

The ADA defines as “disabled” a person who has “a physical or mental impairment that substantially limits one or more major life activities” and urges a broad interpretation of this standard.¹⁷⁶ As seen in *Castelan* and *Fortyune*, those without the use of their arms, including quadriplegics, readily satisfy the standard for disability.¹⁷⁷ In some cases, the court may find a neurodegenerative disease to be sufficiently debilitating such as in the case of *Brady v. Wal-Mart Stores*,¹⁷⁸ *Kimman v. New Hampshire Department of Corrections*,¹⁷⁹ or *Moritz v. Frontier Airlines, Inc.*¹⁸⁰ However, courts will determine on a case-by-case basis whether someone’s disability is such that they are sufficiently impaired from participating in the good or service, and the point may often be conceded by defendants.¹⁸¹ Those who would be adversely affected by straw ban legislation would still generally meet the ADA’s definition of disability.¹⁸² Such people include the elderly, veterans, those born with disabilities, and those who have suffered tragic accidents. The disabilities most frequently included would be neurodegenerative diseases like cerebral palsy, ALS, multiple sclerosis (MS), and muscular dystrophy, as well as spinal cord injuries and upper-limb amputations.¹⁸³ Further, in *Martin*, the Court found the plaintiff’s inability to walk long distances a sufficient disability for golf.¹⁸⁴ Thus, those who lack the strength to lift a glass, cup, or bowl to their mouths are

176. 42 U.S.C. §§ 12102(1)(A), 12102(4)(1)(A) (2012).

177. See *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004) (“[N]o party disputes that Fortyune is disabled.”); *Castelan v. Universal Studios Inc.*, No. CV 12-05481 BRO (AGRx) 2014 WL 210754, at *1 (C.D. Cal. 2014) (taking for granted an individual with no legs and an individual with no arms qualified as disabled).

178. 455 F. Supp. 2d 157, 166, 169 (E.D.N.Y. 2006) (holding that although Wal-mart asserted Brady was not disabled within the meaning of the ADA despite his cerebral palsy, the evidence presented was more than enough to satisfy a finding that Brady was disabled as defined in the ADA).

179. No. 01-cv-134-JD, 2008 WL 649128, at *5 (D.N.H. Mar. 10, 2008) (acknowledging that the defendant did not dispute that the plaintiff, who had ALS, was disabled).

180. 147 F.3d 784, 786 (8th Cir. 1998) (“There appears to be no dispute that Moritz, as a result of her confirmed diagnosis of multiple sclerosis, is considered a person with a disability within the meaning of the ADA.”).

181. See *supra* notes 100–02 and accompanying text.

182. 42 U.S.C. § 12102 (2012).

183. See D.C. OFFICE OF DISABILITY RIGHTS, *supra* note 156 (listing these very types of disabilities).

184. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 668 (2001) (finding that a degenerative circulatory disorder which disrupts blood flow in the defendant’s right leg, causing atrophy and severe pain, was a disability that substantially limited the plaintiff).

likewise sufficiently impaired to qualify as disabled in this context, and a more serious or challenging impairment would clearly qualify.¹⁸⁵

C. Having No Plastic Straws Prevents the Full and Equal Enjoyment of Services and Goods Provided by the Public Accommodation Because People with Disabilities Cannot Partake in the Liquids Being Provided

1. Restaurants provide a good/service for which plastic straws are needed

Restaurants and bars, as well as other public accommodations, provide liquids as a part of their primary goods and services. Having no straws would prevent people who need them from participating in or benefiting from these goods and services.¹⁸⁶ Although the legislation under review is not a “no straw ban”—but instead a “no *plastic* straw ban”—this can still prove a barrier to the enjoyment of a service.¹⁸⁷ Depending on which material is used, non-plastic straws may be hazardous, painful, or even impossible for people with certain disabilities to use depending on the specific circumstance.¹⁸⁸

2. Outright bans and bans with only certain limited exceptions deny this good/service

Legislation or policies that fully ban plastic straws or have limited exceptions targeted at only financial hardship for the business or in rare public emergencies would deny disabled individuals a service or good and the full and equal enjoyment of that good which restaurants, bars, and other public accommodations that serve liquid provide. Some may argue that disabled individuals can refrain from consuming liquid at a bar or restaurant; however, this argument denies the individual full and equal enjoyment. Preventing a disabled individual from consuming a large category of goods served at public

185. See Karin Hitselberger, *supra* note 15 (“As for lids designed to be used without a straw, they require the cup to be lifted by the user, which many people cannot do.”).

186. See D.C. OFFICE OF DISABILITY RIGHTS, *supra* note 156, at 2–3; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 156, at 11; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 152, at 3; Danovich & Godoy, *supra* note 41; Hitselberger, *supra* note 15; Oreskes & Grad, *supra* note 154; *Food Service: Accommodating Diners with Disabilities*, *supra* note 62.

187. See *supra* Section I.A.3.

188. See Danovich & Godoy, *supra* note 41 (noting the danger posed on a hot day for the disabled when no straw is available for them to drink water); Hitselberger, *supra* note 15 (explaining that “no straw means no drink” for a disabled person because drinking hot beverages without a straw risks choking or severe burns); Wong, *supra* note 63 (acknowledging that drinking for a disabled person without the arm strength to lift a drink is extremely difficult and potentially dangerous).

accommodations also denies that individual the fundamental services provided to nondisabled individuals. In *Martin*, the complainant could still play golf but could not walk the whole eighteen-hole course.¹⁸⁹ In *Fortyune*, the plaintiff could see the movie but was just not able to sit next to his partner.¹⁹⁰ In *Gambrinus Company/Spoetzl Brewery*, the plaintiff could still participate in other aspects of the brewery experience and could even take the tour with a human guide but was simply unable to use his guide dog.¹⁹¹ In these situations, the disabled individual could substantially participate or enjoy the service, but accessibility limitations hampered the ability to fully enjoy the services at issue. By contrast, preventing someone from drinking or consuming a liquid or soup at a restaurant, bar, or other public accommodation (or allowing them to do so only at a risk of pain or mortal hazard) is a more significant denial of service or the full and equal enjoyment of a good. Straws are more than a de minimis concern for people with disabilities. Thus, the options for some disabled people are either denial of the good or service as they cannot use it, or cannot use it safely,¹⁹² or consumption of a good or service that is unequal or inferior—like consuming soup or coffee that has had several paper straws dissolve in it or waiting for a liquid usually enjoyed hot to cool so it can be slurped through a glass or metal straw.¹⁹³

Depending on the situation and disability, outright plastic straw bans, or ones with narrow exceptions for business hardship or public emergency, would either be denial of participation in a service or benefit or participation in an unequal benefit under Title III of the

189. See *PGA Tour, Inc.*, 532 U.S. at 667–68 (noting that “Casey Martin is a talented golfer,” but the progress of his disease means that “Martin could no longer walk an 18-hole golf course”).

190. See *Fortyune v. Am. Multi-Cinema, Inc.* 364 F.3d 1075, 1085 (9th Cir. 2004) (“AMC’s refusal to ensure that Fortyune could sit beside his wife denied him . . . ‘the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of [the Theater].’” (quoting 42 U.S.C. § 12182(a) (2012))).

191. See *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1065 (5th Cir. 1997) (noting that the brewery tour guide “informed [the blind plaintiff] that he would not be allowed to take the tour with his dog, but that he could take the tour with a personal human guide such as herself”).

192. Hitselberger, *supra* note 15.

193. See *Danovich & Godoy*, *supra* note 41 (highlighting that going without a plastic straw can be a “matter of life or death” for a disabled individual); Hitselberger, *supra* note 15 (declaring that compostable straws are not an option for disabled individuals because, among other things, they present a risk of choking or burns from hot liquids); Wong, *supra* note 63 (noting that plastic straws are superior to compostable ones because they do not melt or break apart).

ADA.¹⁹⁴ In effect, these laws and internal business policies institute a sort of “no straws” policy, a policy that has already given rise to ADA litigation.¹⁹⁵ However, straw legislation and policies which have exceptions that allow businesses to carry straws for those with disabilities, or those who need them medically, or that just prevent the automatic inclusion of a plastic straw would not deny the full enjoyment of a good or service since the individual need only request it.¹⁹⁶ Those laws and policies allow businesses to carry plastic straws on hand without repercussion and place no greater burden on a disabled individual than they do on other patrons of public accommodations. Requesting a plastic straw is no more onerous or unusual than requesting no ice in one’s water, a table on the patio, or an extra spoon to replace one that fell on the floor. Thus, those laws or policies would not violate the ADA because there is no denial of service or enjoyment of a lesser good or service.

D. Providing Plastic Straws Can Be Considered a Reasonable Modification to Policies or Regulations Preventing their Distribution

Crafting an exception to a business’s policy or a law’s outright ban that would allow for businesses to keep a small supply of plastic straws on hand would also be a reasonable modification under the ADA. This exception is not novel¹⁹⁷ and appears in Santa Barbara’s code, which explicitly names ADA compliance as the purpose of the exception.¹⁹⁸ Some modifications may be unreasonable as they fundamentally alter the service, are not readily achievable, or are prohibitively expensive. This was the case with the installation of the elevator on the cruise ship

194. See 42 U.S.C. § 12182(b)(1)(A)(i)–(ii) (2012).

195. See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 150, at 11.

196. See, e.g., SANTA BARBARA, CAL., MUN. CODE § 9.165.050 (2018) (providing for an exemption for local business for undue hardship, practical difficulty, or medical necessity).

197. See, e.g., D.C. OFFICE OF DISABILITY RIGHTS, *supra* note 156, at 3 (“[T]he Office of Disability Rights recommends that food service entities keep a small supply of plastic straws in stock and available upon request for those patrons with medical necessity.”); JOHNSON, *supra* note 155 (documenting a public comment from an unnamed person: “Yes! I would say to disallow them unless required for accessibility”); *New Ordinance Tackles Plastic*, *supra* note 156 (noting that “businesses in San Francisco are expected to provide reasonable access to goods and services” and this includes having “some plastic straws available in order to ensure reasonable access”).

198. SANTA BARBARA, CAL., MUN. CODE § 9.165.050.

in *Association for Disabled Americans, Inc. v. Concorde Gaming Corp.*¹⁹⁹ and the request that the cruise ship stay at dock for an indeterminate amount of time while a passenger requested a new Bi-Pap machine in *Larsen*.²⁰⁰ However, this would not be the case with carrying plastic straws. Plastic straws would also not be considered prohibitively expensive. Indeed, they are cheaper than alternatives.²⁰¹ Further, carrying plastic straws is something most restaurants and other businesses that serve beverages already do, so it would not be a fundamental alteration of services. Plastic-straw alternatives—those that fall apart—may fundamentally alter the beverages they melt into or otherwise change the taste, making the beverage unpalatable.²⁰² There is thus no reason why a restaurant or bar could not make this modification.

The “no plastic straw” policies and outright bans would further likely violate the ADA, as a reasonable change in policy—keeping a few plastic straws on hand and available on request—is nowhere near as high a burden on businesses as those modifications in policies suggested in the cases above.²⁰³ In *Alumni Cruises, LLC v. Carnival Corp.*, the court denied summary judgment against a proposal that the cruise line hire additional staff and provide additional staff training.²⁰⁴ Nor would it even require the business to carry a special device, like a hand

199. See 158 F. Supp. 2d 1353, 1365 (S.D. Fla. 2001) (holding that the plaintiffs were not entitled to relief because the “installation of an elevator would be both extremely difficult and expensive” and “not readily achievable”).

200. See *Larsen v. Carnival Corp.*, 242 F. Supp. 2d 1333, 1344 (S.D. Fla. 2003) (agreeing with the defendant’s argument that “delaying the ship potentially would have interfered with scheduled port stops on the cruise and the plans of other passengers for those port stops” and holding “that requiring it to modify its policies by having the ship wait indefinitely for a replacement Bi-Pap would constitute a fundamental alteration,” which is not obligatory under the ADA).

201. See *Jumbo Straws*, WEBSTUARANT STORE, <https://www.webstaurantstore.com/753/straws.html> [<https://perma.cc/SY2N-F8NS>] (documenting the relatively low cost for a case of 5000 plastic straws (\$12.31) as compared with \$67.77 for a case of 4800 compostable paper straws).

202. See Hitselberger, *supra* note 15 (“For example, paper straws, which are most often cited as the best alternative, are not temperature safe, often dissolve in water and can become a choking hazard.”).

203. See *supra* notes 114–21 and accompanying text.

204. *Alumni Cruises, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290, 1307, 1310 (S.D. Fla. 2013) (noting the plaintiff’s request for “properly trained and skilled staff” would require the cruise line “to provide at least one individual per room or physically separated setting” who would have to be trained in working with individuals with developmental disabilities, but denying summary judgment because a question of fact remained about “whether the proposed modifications to Camp Carnival constitute reasonable modifications under the ADA”).

tool for a car as in *Karczewski*.²⁰⁵ Rather, the situation is akin to the situation in *Martin*, which found that provision of a golf cart would not fundamentally alter the golf tournament and would be a reasonable modification.²⁰⁶ The Court took particular notice that golf carts are not foreign to golf courses and are otherwise provided by them.²⁰⁷ Likewise, plastic straws are commonplace in most restaurants and bars. Most companies already are used to carrying and providing plastic straws. Requiring a diversity of straw types, or plastic straws in particular, would be in line with the ruling in *Karczewski*, which stated that public accommodations “are required to make reasonable, temporary adjustments to goods already in stock if doing so will help disabled customers access the same goods and services as non-disabled customers.”²⁰⁸ Although straws are generally single use, so the adjustment would not be to the good itself, it would be a reasonable adjustment to goods already in stock and temporary in the sense that plastic straws would only be distributed when needed. Nor would the provision of plastic straws fundamentally alter the nature of the good or service as outlined in Title III.²⁰⁹ Further, modification is not just reasonable, but necessary for the enjoyment of a key good provided by bars and restaurants (pleasing beverages) as well as an associated service (enjoying a

205. *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1017 (9th Cir. 2017) (refusing to find “that the ADA categorically precludes a claim that a car dealership must provide hand controls for test drives,” and speculating, as an example that “the installation of vehicle hand controls is likely reasonable at a large dealership that regularly installs hand controls, has spare universal hand controls on hand, and employs many mechanics with expertise in installing hand controls, when advance notice is given by a customer with clear expertise in using hand controls”).

206. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682, 689 (2001) (noting that the PGA did “not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments” and holding that “the walking rule is at best peripheral to the nature of petitioner’s athletic events, and thus it might be waived in individual cases without working a fundamental alteration”).

207. *Id.* at 683, 685 (providing that the golf cart “is not itself inconsistent with the fundamental character of the game of golf” because it is available on the modern golf course and encouraged to speed the rate of play and increase revenue to the course).

208. *Karczewski*, 862 F.3d at 1014–15 (quoting *Funches v. Barra*, No. 14 Civ. 7382 (KPF), 2016 WL 2939165, at *6 (S.D.N.Y. May 17, 2016)).

209. 42 U.S.C. § 12182(b)(2)(A)(ii) (2012).

beverage alone or with company).²¹⁰ Thus, legal provisions and company policies that prevent this reasonable modification interfere with Title III.²¹¹

Allowing plastic straws to be distributed on a need-by-need basis would be akin to the policies prioritizing seats for wheelchair-using individuals. In *Independent Living Resources*, the arena was ordered to establish a policy that ticket sales for modified aisle seats be prioritized for wheelchair-using individuals so as not to violate the ADA.²¹² In *Fortyune*, the movie theater was ordered to establish a policy prioritizing seats next to the wheelchair seating area be reserved for the companions of handicapped individuals.²¹³ A modification to a business's "no plastic straw" policy or an exception drafted into the plastic straw bans that provide that businesses carry a few on hand for those who need them for medical or disability reasons would be "prioritizing" or "reserving" plastic straws for those with disabilities who really need them.

Insofar as some laws and policies outright ban plastic straws or only include financial hardship exceptions, they would violate the ADA as these laws and policies deny a good to people with disabilities, prevent the full and equal enjoyment of a good or service, and prevent businesses from making a reasonable modification that is necessary for the enjoyment of a good. However, those laws that merely prevent the automatic inclusion of plastic straws, or contain exceptions for medical needs, would not violate the ADA as the good or service may still be enjoyed by people with disabilities. The medical exceptions requirement may place a small burden on those with disabilities since it may be uncomfortable to require disclosure of a disability, particularly when it is not visible on the surface.²¹⁴ However, this is a relatively small burden

210. See D.C. OFFICE OF DISABILITY RIGHTS, *supra* note 156; U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 150, at 11; U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 152, at 3; Danovich & Godoy, *supra* note 41; Hitzelberger, *supra* note 15; Oreskes & Grad, *supra* note 154; *Food Service: Accommodating Diners with Disabilities*, *supra* note 62.

211. 42 U.S.C. § 12182(b)(2)(A)(ii) ("[D]iscrimination includes . . . a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are *necessary* to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities" (emphasis added)).

212. *Indep. Living Res. v. Or. Arena Corp.*, 1 F. Supp. 2d 1159, 1172–73 (D. Or. 1998) (ordering the arena to establish a policy through which they could sell modified aisle seats to those who needed them before others).

213. See *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1087 (9th Cir. 2004) (explaining that the district court's injunction clearly requires the theater "ensure that companions to wheelchair-bound patrons be able to sit with their companions until ten minutes before the film begins").

214. See Alyssa Danigelis, *Why Activists Are Questioning Corporate Plastic Straw Bans*, ENVTL. LEADER (Jan. 28, 2019), <https://www.environmentalleader.com/2018/09/>

compared to the good or service—being able to consume a beverage or other liquid while perhaps socializing with friends and neighbors.

Those laws that simply make plastic straws available on request would also not violate the ADA because they do not ask more of people with disabilities than they do of the public at large and they do not limit the full enjoyment of a service or good. While there may be cases of rude or insensitive employees,²¹⁵ awareness that not all disabilities are visible on the surface is ultimately an issue of company policy and training. The cost of giving a straw to someone who does not require it is miniscule when compared to the legal risk or even public opprobrium a public accommodation faces when it denies a disabled individual use of a straw.²¹⁶

E. Going Forward, Companies and Legislators Should Reconsider These Policies to Mitigate the Impact of Plastic Straw Bans on the Disabled Community

As environmental awareness grows and anti-plastic straw activists continue their efforts, more cities are considering adopting legislation.²¹⁷ So as not to risk running afoul of the ADA, legislatures should modify laws and companies should modify policies. One option is to allow businesses to give plastic straws to customers on request only, rather than automatically when a customer orders a drink. This would be akin to California's law.²¹⁸ It is, however, the least ideal option, as it thwarts the commendable environmental, public health, and economic goals of the bans.

plastic-straw-bans-backlash [<https://perma.cc/PT57-F4H6>] (“Having straws available upon request still puts the onus on people with disabilities to do the asking, advocates argue. ‘People with disabilities,’ Wong wrote, ‘should not have to prove a medical need or even disclose their disability status when having a fun night out with friends. This is not hospitality.’”); *see also* Samira Sadeque, *Woman’s Horrific Restaurant Experience Highlights the Ableism of Plastic Straw Bans*, THE DAILY DOT (June 14, 2019, 11:21 AM), <https://www.dailydot.com/irl/straw-ban-ableism-restaurant-thread> [<https://perma.cc/XT5L-C9SV>] (highlighting a situation where a person with an unapparent handicap was embarrassed by a restaurant when she requested a straw).

215. *See* Sadeque, *supra* note 214.

216. *See id.*; *see also* U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 150, at 11 (citing a case where a restaurant settled for \$500 when it denied a handicapped individual a straw); *cf. Jumbo Straws*, *supra* note 201 (illuminating the inexpensive cost of a case of 5000 plastic straws (\$12.31), or two percent of a penny for a single straw).

217. *See, e.g.*, Jeff Daniels, *Los Angeles Moves Forward on Plan Banning Plastic Straws, Going Further than California State Law*, CNBC (Dec. 5, 2018 10:46 AM), <https://www.cnn.com/2018/12/04/los-angeles-considers-outright-ban-on-plastic-straws.html> [<https://perma.cc/269G-Q65N>].

218. CAL. PUB. RES. CODE §§ 42270–71 (West 2019).

Another option is to keep the bans but require a wide or differing variety of non-plastic straws of various types on hand to accommodate different disabilities and different types of beverages and liquids.²¹⁹ This is a better option as it keeps the laws and policies in place but provides coverage to a wide class of people. However, it may be unwieldy or economically infeasible for some businesses, and in the end, a public accommodation may have failed to account for an issue when choosing which option to go with.

Finally, legislatures and businesses should consider allowing for a limited exemption for those with disabilities or other medical needs. This is the most ideal option. While it would require changing some existing laws, states, municipalities, and businesses going forward can easily adopt language granting a limited exemption for flexible plastic straws. Other plastic food service ware, like plastic coffee stirrers, would not need this exemption and the laws would achieve their purpose of reducing waste by reducing demand for the items down to those who really need them.²²⁰

CONCLUSION

Straw bans seem to make sense to most people, especially those concerned with the environment, but this narrow issue highlights an even broader policy concern—considering the impact on people with disabilities when enacting legislation. Despite constituting a fifth of the U.S. population,²²¹ the disabled community is all too frequently an afterthought when companies and legislators adopt policies. Frequently, issues that could have been uncovered early on only come to light after something is adopted. Another example of this would be the problems arising between silent Prius vehicles (or “Prii”)²²² and the blind.²²³ While in some instances legislators have consulted with disability lawyers, this should be the trend, not the exception.²²⁴

219. Willison, *supra* note 66.

220. *See supra* Section II.E.

221. *Nearly 1 in 5 People Have a Disability in the U.S.*, *Census Bureau Reports*, U.S. CENSUS (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html> [<https://perma.cc/JHU5-VTKU>].

222. Press Release, Toyota, Toyota Announces Plural of Prius (Feb. 20, 2011), <https://pressroom.toyota.com/toyota-announces-the-plural-of-prius> [<https://perma.cc/XC4A-KDBU>] (announcing that the plural of Prius is “Prii”).

223. *See* Martin Zimmerman, *Blind Pedestrians may not Hear Hybrid Cars*, L.A. TIMES (Mar. 29, 2008, 12:00 AM), <https://www.latimes.com/business/autos/la-fi-garage29mar29-story.html> [<https://perma.cc/F7SH-Q6CA>].

224. *See* D.C. OFFICE OF DISABILITY RIGHTS, *supra* note 156, at 2; *New Ordinance Tackles Plastic*, *supra* note 156.

This Comment has reviewed the current state of plastic straw legislation and policies as well as ADA jurisprudence. Plastic straw bans have been placed on a continuum from the most restrictive, outright bans, to those that feature different exceptions, to those that just prohibit automatic inclusion of plastic straws. The ADA prevents denial of a good or service or supplying an unequal good or service. The ADA further requires that public accommodations adopt policies or procedures that implement reasonable modifications when they are necessary to provide goods or services. Plastic straw bans that outright ban or provide exceptions only for financial hardship or public emergencies either deny people with disabilities who need plastic straws from enjoying liquids provided by bars or restaurants or provide them with a diminished experience insofar as alternatives may be painful or alter the nature of the liquid. Further, those laws and policies prevent restaurants and other public accommodations from implementing a reasonable modification in their procedures that would not drastically alter the nature of the product—namely, carrying plastic straws. Policies or legislation that provide for an exception for medical necessity, disabled people, or just prevent automatic inclusion would not violate the ADA as they provide the same options for enjoyment of liquids enjoyed by others and at most only require an individual to ask for a straw. This Comment offers legislators and businesses three potential remedies to ensure compliance, ranging from the least desirable (non-automatic inclusion) to the most desirable (providing for a limited disability or medical necessity exception). Finally, this Comment concludes with an exhortation to businesses and legislators to consider impacts on disabled people and consult with various advocates before implementing new policies and legislation to properly gauge potential negative impacts on this vulnerable population.