Obesity, Canada's One Passenger One Fare Rule and the Potential Effects on the U.S. Commercial Airline Industry

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INTRODUCTION

"[A] fat person variously symbolizes loss of control, a reversion to infantile desires, failure, self-loathing, sloth, passivity and gluttony."1

OBESITY IS OFTEN cited as one of the last “acceptable” bigotries.2 Although racism and sexism are not only socially taboo, but actually illegal in most cases, there is virtually no protection in the United States against obesity discrimination.3 Likewise, unlike other conditions that attract bigotry, the obese are continually blamed for their maligned status.4 Anti-obesity sentiment is nothing new. Even in the early nineties, the media noticed America’s contempt for the obese.5 Moreover, though political correctness may have dulled anti-obesity rhetoric over the past fifteen years, even modern commentators have gone so far as to suggest a special fat-tax for the alleged strain that obese people cause on the economy and healthcare system.6

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1 Natalie Angier, Why So Many Ridicule the Overweight, N.Y. TIMES, Nov. 22, 1992, at 32.


5 Angier, supra note 1.

Commercial air travel is no stranger to the obesity controversy. Ask any “skinny” person, and they will likely have a story about the miserable flight they once had sitting next to an overweight passenger. Ask a severely overweight person how they feel about flying, and you just might get tears. But not in Canada, at least not anymore. On November 20, 2008, the Canadian Supreme Court declined to hear the appeal of a regulatory decision that created the “one person one fare” (1PiF) rule, granting some obese people the right to two seats for the price of one, effectively making 1PiF the law in Canada. Part I of this article will briefly examine the state of obesity bias in the western world. Part II will examine the history of the 1PiF rule, and the statutory and policy arguments behind it. Part III will then show how American anti-discrimination laws generally do not protect against discrimination. It will demonstrate how neither the Civil Rights Act of 1964, the Americans with Disabilities Act, nor the Air Carrier Access Act explicitly include protections against obesity discrimination, and how any implied protections are highly attenuated. Part IV will conclude the article with the reasons why United States law is unlikely to include anything resembling Canada’s 1PiF rule in the near future, and argue that it would actually be improper to do so.

I. THE OBESITY BIASE

As obesity rates have risen, anti-obesity prejudice has risen as well. The National Institutes of Health (NIH) defines obesity as a body mass index (BMI) of 30 or greater. At six-feet tall, one is obese at 221 pounds. At five foot five, one is obese at

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9 National Association to Advance Fat Acceptance, The Issues, available at http://www.naafaonline.com/dev2//the_issues/index.html (last visited Aug. 15, 2009). Of course, the increase in obesity bigotry may also be due to the increase in the number of obese people available to discriminate against or an increased willingness to report obesity discrimination.
180 pounds. The percentage of Americans considered obese grew from 15% in 1980 to 32% in 2004. According to the National Association to Advance Fat Acceptance, 7% of U.S. adults reported weight discrimination in 1995–96, and that rate almost doubled to 12% by 2006. Yet even as America grows ever larger, there is perhaps no physical malady that elicits as much open scorn as being fat. The idea of obesity as a lifestyle choice, as opposed to an ascribed status, seems to fuel the majority of anti-obesity sentiment. Of course, as obesity rates in the western world continue to rise, there are organizations that lobby for and defend the rights of the obese. There are also educational and lobbying organizations working to promote the social acceptance of obesity. Like a modern-day Black Like Me experiment, one celebrity even donned a Hollywood fat-suit to experience obesity first hand, and then reported back to the rest of the fit world on just how bad the stigma truly is. It is within this context of open bigotry and increasing prevalence of obesity that the Canadian Transportation Agency instituted the “one passenger one fare” rule, which requires that carriers provide an extra seat for free to those passengers who are “disabled by obesity.” To understand the Canadian ruling, and how it might influence American policy, we must first understand the ruling’s context.

12 Id.
14 National Association to Advance Fat Acceptance, supra note 9.
15 See Coren, supra note 6.
16 There is actually a cottage legal industry surrounding obesity, for example, the Obesity Law and Advocacy Center, which represents obese clients in insurance and employment matters, among other things. See generally Obesity Law and Advocacy Center, http://www.obesitylaw.com/ (last visited Aug. 15, 2009).
17 See, e.g., the National Association to Advance Fat Acceptance, supra note 9.
18 BLACK LIKE ME is a nonfiction book by John Howard Griffin published in 1961. Mr. Griffin, a white man, died his skin black and posed as a black man while traveling across the racially-segregated south. The book is an account of his experiences.
II. THE CANADA TRANSPORTATION ACT AND THE CANADIAN TRANSPORTATION AGENCY

Canadians are deeply serious about transportation accessibility. The Supreme Court of Canada has confirmed “that the accessible transportation provisions of the [Canada Transportation Act] are, in essence, human rights legislation.” The Canadian Transportation Agency (the Agency) is a quasi-judicial governmental branch empowered with both judicial and investigatory capabilities. The Canada Transportation Act (CTA) provides the guidelines under which the Agency shapes the legal and regulatory framework of the Canadian transit system. Among other duties, the CTA charges the Agency with “eliminating undue obstacles in the transportation network” that hinder the mobility of people with disabilities. The Agency may investigate potential undue obstacles and has the power to remedy any undue obstacles it finds with monetary awards, specific performance orders, or both.

Aside from investigatory and regulatory functions, the Agency also serves as a quasi-judicial administrative tribunal. Canadian citizens may file applications with the Agency claiming that a given practice of one of Canada’s transportation companies creates an undue obstacle that hinders the mobility of people with disabilities. The Agency will first determine if there is any obstacle to people with disabilities, and if so, it will then decide if the obstacle is “undue.” In weighing “undueness,” the respondent in an accessibility case must show that it would be unreasonable, impracticable, or impossible to remove the obstacle without suffering undue hardship. It is important to note that the Agency cannot modify or add to the CTA. As an adminis-

21 Id. at ¶ 1.
23 Id. at § 170(1).
24 Id. at §§ 170(1), (3), 174.
28 Id. at ¶ 9.
trative tribunal, the Agency must take the CTA at face value and may not engraft additional law.\textsuperscript{30}

A. THE ROAD TO 1P1F

1. The Calgary Decision

To act under § 172 of the CTA and order corrective measures for “undue obstacles,” “the Agency must be satisfied that: 1. there is a person with a disability, 2. this person encountered an obstacle, and 3. this obstacle was undue.”\textsuperscript{31} The groundwork for obesity’s inclusion in the first requirement was laid out in what is now called the “Calgary Decision” in 2001. The Calgary Decision resulted from a complaint bought by Linda McKay-Panos regarding her assigned seat on an Air Canada flight between Calgary and Ottawa in August of 1997.\textsuperscript{32} When Ms. Panos made her initial reservations, the agent assigned her to a bulkhead seat in lieu of having her purchase two economy seats or a business-class seat because, according to the agent, the bulkhead seats had the most room.\textsuperscript{33} Ms. Panos was extremely uncomfortable during her trip, and moved to an available business class seat for the second leg of her outbound trip.\textsuperscript{34} Although she was unable to change seats for the first leg of her return trip, she purchased a business class ticket for the second leg as well.\textsuperscript{35}

The Calgary Decision began with the conclusion that the transportation access provisions of the CTA are actually “human rights legislation aimed at removing undue obstacles to the mobility of persons with disabilities in Canada’s transportation system.”\textsuperscript{36} As to human rights, the Agency found that the accessibility provisions of the CTA should be given a “broad, liberal, and purposive interpretation.”\textsuperscript{37}

The Agency began its investigation into obesity as a disability by adopting the World Health Organization’s International Classification of Functioning, Disability and Health (ICF) definition of “disability” as a useful tool for the determination of the

\textsuperscript{30} Id.

\textsuperscript{31} Id. at ¶ 26.


\textsuperscript{34} Id. at ¶ 11.

\textsuperscript{35} Id. at ¶ 11.


\textsuperscript{37} Id. at ¶ 170.
existence of a “disability” under Part V of the CTA.\(^{38}\) The Agency then analyzed obesity on the ICF disability dimensions of “impairment,” “activity limitation,” and “participation restriction;” and then it made six key findings regarding whether or not obesity is a disability under the CTA: (1) whether or not obesity is a disease does not determine whether it is a disability; (2) there must be an impairment for there to be a disability; (3) impairment alone is not sufficient to make obesity a disability; (4) “obese persons do not necessarily experience activity limitations and/or participation restrictions in the context of the federal transportation network;” (5) for an obese person to be disabled, they must experience an activity limitation or participation restriction; and (6) fact-based evidence of an activity limitation or participation restriction is necessary to prove that an obese person has a disability.\(^{39}\) Under those guidelines, the CTA found that obesity was not a per se disability, but that there may be obese people who have a disability attributable to their obesity.\(^{40}\) The Agency concluded by stating that it would have to continue to conduct case-by-case investigations into whether obesity is a disability.\(^{41}\)

In finding that obesity can be the cause of a disability, the CTA, perhaps unknowingly, paved the road to 1P1F. A pivotal, long standing principle of Canadian transportation accessibility is that “all persons with disabilities are entitled to be treated in the same manner regardless of the underlying reason for their disability.”\(^{42}\) Simply stated, the underlying cause of the disability is unimportant.\(^{43}\) Thus, if a traveler has trouble walking, theoretically, it would not matter whether the cause was a missing leg or morbid obesity. Additionally, it does not seem to matter whether the disability is ascribed to or the result of voluntary activity. Therefore, even if the American sentiment is right, and most obese people are simply making a lifestyle choice, they could still be considered disabled under the application of this principle. This issue of causation would arise again, and would prove a critical factor in the 1P1F policy, and a crucial differentiator between Canadian and U.S. jurisprudence.

\(^{38}\) Id. at ¶ 186.  
\(^{39}\) Id. at ¶ 205.  
\(^{40}\) Id. at ¶ 206.  
\(^{41}\) Id. at ¶ 207.  
\(^{43}\) See id.
2. Stuffing the Genie Back In the Bottle: Revisiting Air Travel and Obesity

Having determined that obesity may be a disability under the CTA, the Agency continued its analysis in 2002 with the McKay-Panos case, investigating whether Ms. McKay-Panos herself actually had an obesity-related disability for purposes of Part V of the CTA. The "Analysis and Findings" section of the decision begins with a review of the purpose of the CTA. The Agency noted that although the purpose of the CTA is to make the transportation system accessible to disabled people, the accessibility is not meant to be unlimited, requiring the removal only of avoidable, undue obstacles. The Agency then continues to specify that although the ICF definition of disability was a "useful tool" in determining whether or not a person is disabled under Part V of the CTA, that the ICF definition is too broad and overly inclusive. Accepting the ICF definition would include all obese people as disabled under the CTA, a result already rejected in the Calgary Decision.

Having set a formal tone, the Agency continued to narrow its previous holding. After defining a narrower scope for the purpose of the CTA, and rejecting the ICF definition of disability as a standalone-test, the Agency explained that it is required to follow a linear, three-step process in determining whether it may take corrective measures under the Part V of the CTA. These steps, taken in order are that "1. There is a person with a disability; 2. This person encountered an obstacle; and 3. This the obstacle was undue." Adhering rigidly to the three-step process, the Agency excluded information about Ms. McKay-Panos's discomfort in the seat when deciding whether or not she had a disability. Explaining their reasoning, the Agency noted that considering the seat in the first stage "requires the Agency, when assessing the disability of a person, to focus on the obstacle, namely the seat." The Agency explained that such an approach disregarded the three-step process, which required the

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45 Id. at ¶ 21-22.
46 Id. at ¶ 23.
47 Id. at ¶ 34.
48 Id. at ¶ 33.
49 Id. at ¶ 26.
50 Id.
51 Id. at ¶ 34-35.
52 Id. at ¶ 34.
Agency to consider the obstacle at stage two, not stage one. The Agency continued, "[i]t is not the obstacle that makes a person deaf, blind or paraplegic and the Agency does not agree that it should be different in the case of obesity." This line of reasoning placed Ms. McKay-Panos, and arguably all obese would-be plaintiffs, in an apparent catch-22. Under the Calgary Decision, applicants are required to provide fact-based evidence of activity limitations and participation restrictions. However, the Agency had excluded all evidence regarding the obstacle (the seat) from the analysis. Applicants were therefore precluded from using evidence of the limiting or restricting item to prove that there was a limitation or restriction. The Agency then found no evidence of a disability and dismissed Ms. McKay-Panos' application.

The same three-member panel decided both the 2001 Calgary Decision and the subsequent 2002 McKay-Panos holding. However, there is a clear difference in tone and result between the two decisions. The Calgary Decision used sweeping language; created a general, open-ended test for obesity-disability; and elevated transportation access to a basic human right. Contrast that with the limiting language, backpedaling, and reversion to a technicality in the subsequent decision, and one begins to suspect that the Agency realized that it may have let a genie out of its bottle, and was trying to stuff it back in. However, Ms. McKay-Panos would not be deterred, and appealed the CTA decision to the Canadian Federal Court of Appeals, which eventually heard the case in 2006, because of Air Canada's bankruptcy, which was not lifted until September 2004.

3. The Federal Court Weighs In: McKay-Panos, Re

The sole issue on appeal was whether the Agency's holding was proper when they determined that an obstacle could not be considered in determining whether there is a person with a disa-
bility.61 Although the legal battle was now nine years old, Ms. McKay-Panos was no longer alone. The Council of Canadians with Disabilities (CCD) was involved in a case for Joanne Neubauer and Eric Norman, arguing for 1P1F for disabled people and intervened in Ms. McKay-Panos’ federal appeals case, submitting a brief on disability as applied to the CTA.62 The Federal Court quickly concluded that the Agency erred when refusing to consider evidence of the obstacle in determining whether a person has a disability.63 The court held that there was no basis for concluding that considering the obstacle at the disability stage would prevent or disrupt the consideration of the obstacle later in the process.64 Since an obstacle is only ultimately relevant if it is “undue,” the court reasoned that considering an obstacle’s mere existence as part of the disability determination would not disrupt the later determination of whether the obstacle is “undue.”65

Progressing with a common sense approach, the court concluded that the Agency had effectively removed all contextual evidence from the inquiry into whether a person has a disability,66 and that arguably there can be no disability without a contextual frame of reference.67 Having highlighted the error of the Agency, the court remanded the case for the Agency’s review of whether Ms. McKay-Panos, as a disabled person, encountered an undue obstacle.68 Towards the end of the discussion, the Court of Appeals delivered an interesting sentence that would later be quoted by the Agency in the 1P1F decision:

In this regard, the relative ease with which the existence of a disability can be established at the first stage should not be construed as preventing the Agency from having regard to all relevant considerations at the undue obstacle stage of the analysis including, for instance, etiology if it is shown to be relevant.69

By focusing on the etiology (causation) of the disability in the undue obstacle, the appeals court apparently invited the Agency

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61 Id. at ¶ 32.
63 McKay-Panos v. Air Canada, [2006] FCA 8, ¶ 37 (Can.).
64 Id.
65 Id. at ¶ 39.
66 Id.
67 Id. at ¶ 40.
68 Id. at ¶ 45.
69 Id. at ¶ 44.
to consider the cause and, on related grounds, perhaps the mutability of the disability in determining whether the obstacle is "undue." So, although the court of appeals swung the "disability" door wide open, they left a potential screen for the "undue obstacle" portion of the test. In 2008, the Agency would decide once and for all how that language would play out for obese airline passengers.

B. The 1P1F Ruling

1. The Demands

In what is perhaps a rare example of judicial economy, after hearing Ms McKay-Panos' case, the Agency elected to add obesity to the issues being decided in the pending Neubauer and Norman case. Ms. McKay-Panos intervened in that case to represent the specific issue of undue obstacles for persons disabled by obesity. Ms. McKay-Panos's case was no longer limited to obesity, but now encompassed all disabled people who need more than one seat when flying. The applicants requested that: (1) anyone with a disability who is required by the carrier to travel with an attendant gets a free seat for the attendant; (2) any person "disabled by obesity" and who "cannot lower the armrest of the seat assigned safely and with dignity" be given a second, adjacent seat for free, or an upgrade to a larger seat for free; and (3) free additional seating for anyone with a disability who needs extra seating. The applicants also requested that no airport improvement fees be added to the additional seats provided by the carriers.

2. The Issues

By this point, the question of whether or not obesity could qualify as a disability was settled. The previous McKay-Panos cases cleared the way for obesity to be a disability under the CTA by a case-by-case factual analysis in light of the challenges faced by the person when traveling. All that remained, per the Fed-

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70 Id.
71 See id.
72 Meiname, supra note 62.
74 Id. at 41–43.
75 Id. at ¶ 2.
76 Id.
77 McKay-Panos v. Air Canada, [2006] FCA 8, ¶ 40 (Can.).
eral Court of Appeal’s holding in *McKay-Panos, Re* was to determine whether there was an obstacle, and if so, whether the obstacle was "undue."\(^7\)

### 3. *The Decision*

The Agency began their obstacle discussion by stating the elements for a prima facie case that an obstacle exists at all in the context of the CTA. The three elements for CTA obstacles are: "[(1)] a distinction, exclusion or preference resulted in an obstacle to the mobility of a person with a disability; [(2)] the obstacle was related to the person's disability; and [(3)] the obstacle discriminates by imposing a burden upon, or withholding a benefit from[,] a person with a disability."\(^7\)\(^9\) After a brief discussion, the Agency concluded that requiring disabled people to purchase additional tickets constitutes an obstacle to their travel.\(^8\)\(^0\) Indeed, having to pay twice as much for air travel appears an easy candidate for an "obstacle" to travel.

The Agency then devoted considerable space to the discussion of whether the required additional tickets are "undue hardships."\(^8\)\(^1\) Again, the Agency recited a three-step approach.\(^8\)\(^2\) After the applicant has made out a prima facie case of an obstacle, the burden shifts to the respondent to prove, by a preponderance of the evidence that: (1) the obstacle is rationally connected to a legitimate objective; (2) the obstacle was adopted by the carrier with a good faith belief that it was necessary; and (3) the obstacle is reasonably necessary for the accomplishment of its objective such that the carrier cannot accommodate the person without suffering undue hardship.\(^8\)\(^3\) The carrier must show that it has provided reasonable accom-

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\(^9\) Id. at ¶ 138. For reference, the accessibility provision of the Americans with Disabilities Act states "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2000 & Supp. V). The key difference between Canadian and American policy for our purposes is the acceptance of obesity as a disability.


\(^1\) Id. at ¶ 171.

\(^2\) Id. at ¶ 172.

\(^3\) Id.
modations to the disabled person up to the point of undue hardship on the carrier.\textsuperscript{84} Undue hardship is determined through a balancing test between the interest of the disabled, and the interests of the carrier in light of the circumstances of the case.\textsuperscript{85} The test includes such considerations as the severity of the obstacle, how frequently it occurs, and the carrier's commercial, economic, and operational considerations.\textsuperscript{86} To show undue hardship, the carrier must show "that there are no reasonable alternatives to better accommodate the person with a disability" and that the removal of the obstacle is unreasonable, impracticable, or impossible.\textsuperscript{87}

The Agency concluded that, regarding the additional ticket purchase requirements, the airlines easily met the first two elements: (1) a rational relationship between the obstacle (the additional fare) and a legitimate business objective, and (2) the adoption of the obstacle in good faith.\textsuperscript{88} The remaining issue then was whether the requested relief, that is, 1P1F, would be an undue hardship on the carriers.\textsuperscript{89} The carriers raised three main objections, safety, cost, and operational constraints.\textsuperscript{90}

The safety argument raised by the carrier did not address obesity, but rather focused on travelers who need an attendant while flying.\textsuperscript{91} The carriers focused on the applicants' contention that the airline, for safety reasons, requires some passengers to have attendants.\textsuperscript{92} The carrier suggested that the most inclusive measure would be to simply drop the requirement, leaving the passenger free to decide whether they need an attendant or not.\textsuperscript{93} However, as eliminating the requirement would create an unreasonable safety concern, the carriers concluded that no reasonable accommodation was possible.\textsuperscript{94} The Agency quickly dismissed the carrier's argument as misstating the issue, which was not the imposition of a rule requiring the extra seat, but rather the fact that the travelers truly do need an extra seat due to their

\textsuperscript{84} Id. at ¶ 173.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at ¶ 175.
\textsuperscript{88} Id. at ¶ 203–10.
\textsuperscript{89} Id. at ¶ 172.
\textsuperscript{90} Id. at ¶ 212.
\textsuperscript{91} Id. at ¶ 216.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
disability, and are being charged more than non-disabled flyers.\footnote{Id. at ¶ 217-19. All in Canadian dollars.}

The Agency then examined the financial implications of implementing the 1P1F policy.\footnote{Id. at ¶ 220.} After an exhaustive review, the Agency concluded that the lost revenue to Air Canada would be $7,086,288 and the costs to West Jet would be $1,467,814.\footnote{Id. at ¶ 701.} These overall numbers equate to per-ticket increased costs of $0.41 and $0.16 respectively,\footnote{Id.} meaning, for example, that if every ticket sold by Air Canada was increased by $0.41, they would cover the costs of the 1P1F policy. Expressed in terms of likely increase in domestic fares, Air Canada would increase a $244 ticket by $0.77, while West Jet would increase a $140 ticket by $0.44.\footnote{Id. at ¶ 712.} The Agency found that costs of this size do not represent an undue hardship to the airlines in question. In fact, the overall cost increase was found to be within the "margin of error" in terms of general revenue expectations, and would not have a material impact on the market.\footnote{Id. at ¶ 828.}

The carriers also raised an economic policy argument in that the 1P1F policy creates a cross-subsidy, where regular travelers must pay above-market rates so that disabled travelers can pay below-market rates.\footnote{Id. at ¶ 723-27.} However, the "marginal" cost increase for each ticket, and the Canadian view of transport accessibility as a basic human right apparently satisfied the Agency that a cross subsidy was an acceptable remedy for a transportation obstacle.\footnote{Id. at ¶ 741-42.} The Agency also noted a number of positive economic effects, including greater ability for disabled persons to travel for work.\footnote{Id. at ¶ 744.}

The Agency next discussed the operational constraints of implementing the 1P1F policy.\footnote{Id. at ¶ 830.} From an obesity perspective, the question was how to determine when someone is too large to reasonably fit in a single seat.\footnote{Id. at ¶ 862.} The carriers argued that, for a number of reasons, such a determination would be impossible
to administer. First, the carriers argued that although they may be able to provide accommodation to obese people at the airport on the day of travel, on an *ad hoc* basis and if load factors permit, that it would be unreasonable to expect them to set up a screening process to determine in advance whether someone is too big for a single seat. The carriers also argued that “fit” and “comfort” are subjective characterizations that would be difficult if not impossible to objectively test, and that many people, obese or otherwise, complain about uncomfortable airline seats. Strikingly, the Canadian carriers’ undoing came from an American company—Southwest Airlines. Southwest Airlines’ “Customers of Size” policy simply states that if a passenger cannot lower the armrest, they must buy an extra seat. The Agency noted that Southwest seems to have been able to operationalize a test to determine if customers are too big for a single seat; so, Air Canada and West Jet should be able to do the same.

Having dispensed with the carrier’s undue hardship objections, the Agency reiterated a number of policy arguments it held as crucial to the holding. Among these arguments was that “all persons with disabilities are entitled to be treated in the same manner regardless of the underlying reason for their disability.” Here, the Agency returned to the enticing “etiology” clause included in the *McKay-Panos* court of appeals case. Although the Agency recognized that it had the ability to consider causation of the disability in the analysis of “undue obstacles,” they determined that such a consideration would be inconsistent with the non-causational equality policy argument, and it was therefore improper to include in the analysis.

Having found that people with disabilities were encountering undue obstacles, the Agency laid down its order for corrective measure, forbidding the carriers from charging additional fares

106 *Id.*
107 *Id.* at ¶ 861.
108 *Id.* at ¶ 862–63.
109 *Id.* at ¶ 879.
112 *Id.* at ¶ 894.
113 *Id.* at ¶ 898.
114 *Id.* at ¶ 898–99.
115 *Id.* at ¶ 1898.
for seats provided to: (1) people required by the airlines to fly with an attendant; (2) people disabled by obesity; and (3) people who otherwise need additional seating because of their disability.\textsuperscript{116} The Agency gave the carriers twelve months to implement this rule, setting a January 10, 2009 deadline.\textsuperscript{117} Though carriers appealed, the Federal Court of Appeals denied the carriers leave to appeal, and the Canadian Supreme Court finally dismissed the carrier's application for leave to appeal on November 20, 2008.\textsuperscript{118}


Note the interplay between the Canadian Federal Court of Appeals organic, functional use of the three-part undue-obstacle test, and the Agency's rigid, formal application. The decision by the Agency that obesity \textit{could be} a disability\textsuperscript{119} was quickly extinguished by their subsequent, formalistic holding that even though Ms. McKay-Panos was morbidly obese, she was not disabled under the CTA.\textsuperscript{120} In that holding, the Agency listed their three-part test, and found that it would be improper to consider the obstacle (stage two and three) at the "disability" (stage one) stage of the analysis.\textsuperscript{121} The Canadian Federal Court of Appeals, however, applied a less formal approach, and found no reason that one could not consider the obstacle at the disability stage of the analysis, and overturned the Agency's decision.\textsuperscript{122} The court of appeals also noted that one could consider the disability (at least the cause of the disability) at the "undue obstacle" stage,\textsuperscript{123} and even questioned whether the three-part test was really two parts in disguise.\textsuperscript{124} However, when the Agency re-heard the obesity arguments, it again performed a formal analysis, accepting, as it must have, the court of appeals inclusion of the obstacle in the disability stage, but declining, as it might have, to

\textsuperscript{116} Id. at ¶ 916.

\textsuperscript{117} Id. at ¶ 918–19.


\textsuperscript{121} Id. at ¶ 34.

\textsuperscript{122} McKay-Panos v. Air Canada, [2006] FCA 8, ¶ 37 (Can.).

\textsuperscript{123} Id. at ¶ 44.

\textsuperscript{124} See id. at ¶ 39.
include the cause of the disability in the obstacle stage. Only through this oscillating functional/formal analysis did the 1P1F policy become approved for all "disabled" obese passengers.

5. Determining Who is Disabled Under 1P1F

The Agency's 1P1F decision, though certainly a landmark ruling benefiting the obese, leaves the question of who is "disabled by obesity" unanswered. The Agency left that question to the airlines, though they did note Southwest Airlines' policy as a possibility. The airlines, however, chose a different path. Instead of implementing any kind of test at the airport, as Southwest Airlines does, the airlines require obese travelers to obtain a doctor's note attesting to their "disability." Both Air Canada and WestJet's extra seating policy states that passengers who need an extra seat because they are disabled by obesity require medical approval for travel. Prospective passengers must have their physicians fill out and sign a questionnaire detailing the passenger's height, weight, body mass index, and hip width. After the physician completes and signs the form, the prospective passenger must book their travel and fax the form at least forty-eight hours before the trip. The carriers then decide whether or not the person qualifies for free additional seating, although they do not publish their criteria.

126 Id. at ¶ 74.
Passengers who are disabled by obesity according to Air Canada can receive a two-year approval for an additional seat once their application has been processed.\(^{132}\) WestJet offers either one-year approval for passengers with transient disabilities or permanent approval for passengers with disabilities expected to last their entire lives.\(^{133}\)

To put it plainly, by requiring a doctor to certify that the prospective traveler's size requires more than one seat, the carriers punt the issue of obesity disability to the medical community. After all of the discussion about how difficult it would be to decide who is disabled by obesity, the carriers elected to essentially have someone else decide. What's more, they failed to consult the Canadian Medical Association (CMA) before launching the program to all of Canada.\(^{134}\) The CMA intends to ask the airlines to reconsider their policy.\(^{135}\)

III. OBESITY DISCRIMINATION AND UNITED STATES LAW

American anti-discrimination law, though firmly rooted in our culture, is based in commerce rather than human rights.\(^{136}\) It was the federal government's ability to regulate interstate commerce that led to the first federal legal challenge to racial discrimination.\(^{137}\) So while Canada's legal system sees transportation access as a basic human right, the empowering legislation for disability equality in U.S. law is not so profound. Perhaps as a reflection of American attitudes towards obesity, existing U.S. law offers virtually no protection for the obese. There are three main anti-discrimination legal frameworks in the United States that could prohibit discrimination against the obese: the Civil Rights Act of 1964, the Americans with Disabili-


\(^{135}\)  Id.


\(^{137}\)  See generally Heart of Atlanta Motel, 379 U.S. 241; Katzenbach, 379 U.S. 294. These seminal cases used the federal power to regulate interstate commerce as a means to forbid discrimination in hotels and restaurants. See generally Heart of Atlanta Motel, 379 U.S. 241, Katzenbach, 379 U.S. 294.
ties Act, and the Air Carrier Access Act. For various reasons, each fails to give the obese the protection they continually seek, whether trying to get a job or a seat on an airplane. The next section discusses the state of obesity discrimination law in the United States and offers some suggestions for potential obesity-related claims.

A. THE CIVIL RIGHTS ACT OF 1964

The grandfather of modern anti-discrimination law is the Civil Rights Act of 1964 (the 1964 Act). Arguably still the most important piece of anti-discrimination legislation, Title VII of the 1964 Act (Title VII) addresses an array of discrimination in employment situations. Title VII prohibits discrimination with respect to hiring, compensation, terms, conditions, and privileges of employment because of such individual’s race, color, religion, gender, or national origin. Attentive readers may already notice a problem—the statute does not mention “weight” anywhere in the list of protected classes. Title VII simply does not address direct obesity discrimination. Thus, while you cannot be fired for being black or Asian, and you cannot be paid less because you are a woman or a Muslim, you can, under Title VII, be paid less, be fired, be forced to office in the basement, or be otherwise discriminated against because you are fat.

1. Disparate Impact—Introduction

The type of intentional discrimination described above is termed “disparate treatment,” and arises when an employer intentionally treats one class of people differently than another. However, there is another type of discrimination, originally judicially engrafted into Title VII, and later codified in the 1991 amendments to the 1964 Act, called “disparate impact.” The 1991 amendments made it clear that not only were employers

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140 Id.
141 Id.
prohibited from directly discriminating against protected classes of employees, but that in many situations, employers would also be prohibited from adopting facially neutral policies and practices that disparately impact one or more protected classes.\textsuperscript{146} A textbook example of disparate impact is Dothard\textit{ v. Rawlinson}, the Alabama prison guard case, where the Court struck down prison guard height and weight requirements because they had a disparate impact across gender.\textsuperscript{147} So even though height and weight are not protected classes under Title VII, people who are discriminated against on the basis of height, weight, or any other characteristic may have a cause of action if the discriminatory policy impacts a protected class.\textsuperscript{148}

Modern commentators are already considering how disparate impact claims may apply to obesity discrimination.\textsuperscript{149} According to the U.S. Department of Health and Human Services, National Center for Health Statistics, obesity is particularly prevalent in black/African American women.\textsuperscript{150} The 2004 data shows that although the overall, national obesity rate for people aged 20 and over is 31.4%; 51.6% of black/African American women are obese—a 19.3% difference.\textsuperscript{151} Obesity may not be a protected class, but race and gender are both protected under the 1964 Act. So it may be possible to make a disparate impact racial and/or gender discrimination case based on obesity discrimination policies.\textsuperscript{152}

2. The Elements of a Disparate Impact Claim

To make a prima facie case for disparate impact claims under Title VII of the 1964 Act, the plaintiff must show that a policy of the employer discriminates against a particular protected

\textsuperscript{146} 42 U.S.C. § 2000e-2(k).

\textsuperscript{147} 433 U.S. 321, 328–32 (1977). According to the Court, the height and weight requirements included roughly 99.76% of men and 58.87% of women, showing a clear disparate impact between genders. \textit{Id.} at n.12.

\textsuperscript{148} \textit{See id.}


\textsuperscript{150} \textit{See} Centers for Disease Control, \textit{supra} note 13.

\textsuperscript{151} \textit{Id.}

One rule of thumb detailed in the Equal Employment Opportunity Commission (EEOC) regulations for establishing disparate impact is the “80% rule.” A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact. This means that if some program, through various criteria, selects 50% of Caucasians for some benefit, but only 39% of a given ethnic minority, then the statistics support a finding of disparate impact. Taking the inverse of the obesity numbers above, 67.7% of the overall population is not obese, while only 48.4% of black/African American women are not obese. Applying the 80% rule, we see that 48.4% divided by 67.7% equals 71.5%, meaning that the non-obese selection rate for black/African American women is less than 80% of the selection rate for the general population, and would therefore support a disparate impact argument. However, courts may not actually allow the combination of protected classes to create new “sub classes.” Although race is protected, and gender is protected, the intersection between race and gender (for example, being a black woman) may not be protected beyond the protections given to the individual classifications under separate review.

After the plaintiff establishes a prima facie case, the burden shifts to the employer to show that the policy is job related, and a “business necessity.” In the case of obesity, there are a slew of explanations an employer could conceivably raise depending on the job in question, from physical activity requirements in active jobs, to physical attractive preferences in service jobs, to simple geometric necessity for jobs like an airline steward, which require working in small spaces. Indeed, weight requirements for airline employees have even been upheld as grooming standards, as long as the standard applies equally to both men and women. Once the employer demonstrates that the policy is

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155 Id.
156 See id. 39% divided by 50% equals 78%, which is less than the 80% cutoff.
158 Degraffenreid, 413 F. Supp. at 142.
related to the job, the burden shifts back to the plaintiff to show that there is no alternative, non-discriminatory policy that could accomplish the same goals. Thus, it is eventually the plaintiff's burden to prove that some criteria other than level of obesity could be used as a criteria by the employer, and that this other criteria would not also result in disparate racial impact.

3. Title VII Disparate Impact Claims Are Not Ideal For Obesity Discrimination Litigation

Disparate impact obesity claims are largely uncharted waters. There are an excessive number of hoops to jump through for any plaintiff in such an action, including: (1) identifying a policy that discriminates against the obese; (2) showing that there has actually been an disparate impact on a protected class; (3) proving that the obesity-discrimination policy is the cause of that disparate impact; and (4) showing either that there is no rational business need for such a policy, or that despite the need for such a policy, an alternative, nondiscriminatory policy exists. Additionally, in order to actually benefit the obese generally, and not just the individual plaintiff, the alternative policy must not be weight-based, and there is little to no guarantee of such an outcome.

In summary, Title VII provides little hope for obesity discrimination protection, and is not an appropriate basis for a United States equivalent to Canada's 1P1F law. Indeed, Title VII applies only to employment situations, not to customers. There is a separate statute making it a crime to interfere with any person traveling on any common carrier (which includes airlines) because of the traveler's race, color, religion, or national origin, but there is no indication as to whether a judge would be willing to engraft a disparate impact cause of action onto this statute as was engrafted onto Title VII of the 1964 Act prior to the 1991 amendments. In fact, it seems likely that the judiciary would not choose to engraft a disparate impact cause of action, since the 1991 amendments were largely a reaction to the 1989 holding in Wards Cove Packing Co., Inc. v. Antonio, which elimi-

162 See id.
nated the judicially-created Title VII disparate-impact claims. Absent a statutory amendment, Title VII, though a stalwart workhorse of anti-discrimination law, is unlikely to result in general relief against obesity discrimination.

B. The Americans with Disabilities Act of 1990

Congress passed the Americans with Disabilities Act of 1990 (ADA) "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." There are both employment and access provisions to the ADA. The access provisions do not apply to airlines, however, which are instead covered by the Air Carrier Access Act (ACAA).

1. The Elements of an ADA Claim

The employment provisions of the ADA follow a familiar, burden shifting method of proof similar to Title VII cases. Unlike Title VII, an employee litigating disability discrimination under the ADA must show that they are able to perform the essential elements of the job. If the plaintiff succeeds in that showing, the burden shifts to the employer to articulate a non-discriminatory reason for the treatment. The plaintiff must then prove that the non-discriminatory reason is a mere pretext for intentional discrimination.

For the purposes of the ADA, "[t]he term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such impairment." To be "regarded as" having a disability, the discriminator must have a misconception about the individual presumed to be disabled.

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171 42 U.S.C. § 12111(8).
172 Raytheon, 540 U.S. at 50 n.3.
173 Id.
The discriminating party must wrongfully believe either that "one has a substantially limiting impairment that one does not have," or alternatively, "that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." The ADA statute does not define "substantially limits" or "major life activities," but the EEOC has outlined a number of illuminating regulations, though there is still ample room for interpretation. It is this very ambiguity that appeals to potential obesity-discrimination litigants. Since there is no pre-defined list of qualifying disabilities, there is the possibility that obesity could qualify.

2. Cook v. State of Rhode Island, and a Ray of Obesity Discrimination Hope

Cook v. Rhode Island Department of Mental Health, Retardation and Hospitals is a milestone obesity discrimination case holding that obesity can be a disability in the United States. Cook was filed under the Rehabilitation Act, a set of anti-discrimination laws that prohibits agencies that receive federal funds from discriminating against certain disabled employees. However, the definition of "disability" is essentially the same in both the ADA and the Rehabilitation Act, and case law from the Rehabilitation Act cases defining "disability" can apply to ADA cases as well. Bonnie Cook applied to work as a nurse for the Rhode Island Department of Mental Health, Retardation, and Hospitals (MHRH). At five-foot two and three hundred and twenty pounds, Cook was morbidly obese. Despite her size, Cook was able to pass her pre-employment physical examination, but was still not hired. The MHRH claimed that "Cook's morbid obesity compromised her ability to evacuate patients in case of an emergency and put her at greater risk of developing serious ailments (a 'fact' that MHRH's hierarchs speculated would promote absenteeism and increase the likelihood of workers' compensation claims)." Cook sued under the third prong of the Rehabilitation Act.
tion Act/ADA definition of disability—that she was regarded as having a disability.\textsuperscript{185}

The \textit{Cook} court's analysis of the definitions for "major life activities" and "substantially limits" is helpful to an understanding of how it may be possible to apply the ADA to obesity law. The court first analyzed "major life activities," finding that the defendant's own testimony stated that he believed Cook's obesity diminished her ability to walk, bend, stoop, and kneel to the point that she would be unable to work as a nurse.\textsuperscript{186} These are precisely the kinds of activities covered by the ADA regulations on "major life activities," which specifically includes "walking."\textsuperscript{187} The court found that on this basis alone, the jury could have found that MHRH regarded Cook's obesity as affecting a major life activity, and thus uphold that portion of the trial court's findings.\textsuperscript{188} The court then looked at whether the effected "major life activities" were substantially limited.\textsuperscript{189} Noting that the Rehabilitation Act regulations did not provide any guidance on the meaning of "substantially limits," the court looked to the ADA regulations for guidance.\textsuperscript{190} Thus, the court's findings on the substantiality of the limitations are particularly relevant to ADA obesity litigation. First, the court states that the degree of limitation is a question of fact for the jury, and indicates that the jury's finding would only be overturned if the court found the evidence was insufficient to support such a finding.\textsuperscript{191} MHRH felt that Cook's obesity would preclude her from a wide variety of healthcare jobs, including "community living aide, nursing

\textsuperscript{185} Id. at 22.
\textsuperscript{186} Id. at 25.
\textsuperscript{187} "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (2008).
\textsuperscript{188} Cook, 10 F.3d at 25.
\textsuperscript{189} Id.
\textsuperscript{190} Id. at n.10. Under the ADA regulations,

\textsuperscript{191} See Cook, 10 F.3d at 25.
home aide, hospital aide, and home health care aide.”

Again, the judge rather quickly concludes that this statement alone could have led a reasonable jury to conclude that MHRH regarded Cook as substantially disabled.

At this point, it is important to note the degree of psychological speculation inherent in “regarded as” disability litigation. Recall that Cook’s entire cause of action is about speculation—the opinion of the defendant as to Cook’s degree of disability—not whether she was factually disabled. The court’s review can be summarized as their opinion of the jury’s opinion of the defendant’s mistaken opinion of the severity of Cook’s obesity-related disability. This is an important point for obesity discrimination under the ADA, because it underscores how the shifting tide of public opinion may influence perceived-disability obesity litigation.

MHRH attempted to raise two defenses that neatly encapsulate both American obesity bias and modern obstacles to obesity bias legislation: mutability and voluntariness.

There is some conceptual overlap between the concepts of mutability and voluntariness, indeed one usually accompanies the other. Both “defenses” also reflect the essence of American obesity bias—if she is disabled because she is fat, it is her own fault. The court dispenses with each defense in turn. Though the requirement of immutability appeared in the original jury charge, the court, in dicta, found no reason to require immutability outright. Instead, the court suggested that the mutability be considered in the severity of the disability, not as a threshold issue barring a finding of disability at all. However, since the jury charge had gone without objection, the court continued its analysis into the mutability of Cook’s obesity.

Though the court did find evidence that the metabolic condition associated with morbid obesity persists after weight loss, suggesting immutability, the court noted that in a “regarded as”

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192 Id.

193 Id. Under modern ADA litigation, a plaintiff in Cook’s situation would likely claim that an offending employer regarded her as substantially limited in the major life activity of “working,” which neatly fits the defendant’s statements and is also specifically mentioned in the EEOC regulations. 29 C.F.R. § 1630.2(i) (2006).

194 See Cook, 10 F.3d at 25.

195 Id. at 23–24.

196 Id.

197 Id. at 23.

198 Id. at n.7.

199 Id. at 23.
disability action, it is once again only the perception of the defendant that is at issue.\textsuperscript{200} Even if immutability were a requirement, all the employer would need to do would be to act in a way that demonstrates that he \textit{regards} the condition as immutable.\textsuperscript{201} Noting that the defendant’s own expert testified that it is dangerous to lose more than twenty percent of your body weight in a single year, and that MHRH would not have hired the defendant until she weighed less than one hundred and ninety pounds, the court held that at the very least, a reasonable jury could have found that MHRH regarded Cook’s condition as immutable for the two years it would have taken her to lose that much weight.\textsuperscript{202}

MHRH also argued that because some part of obesity is due to voluntary behavior, that it cannot be a disability.\textsuperscript{203} In dispensing with this claim, the court noted that nowhere in the definition of “disability” is there any indication that the cause of the disability plays a role in deciding whether the disability qualifies for protection.\textsuperscript{204} Note the similarity here between the \textit{Cook} court’s dismissal of the importance of causation, and the Canadian Agency’s unwillingness to include causation in their analysis of who should qualify for the IPIF program.\textsuperscript{205} The court also noted that the original jury instructions had (perhaps erroneously) required the jury find that Cook was powerless to control her condition,\textsuperscript{206} and that there was medical testimony that Cook’s weight was the result of an underlying metabolic and appetite regulation disorder.\textsuperscript{207}

Having extinguished all of MHRH’s arguments, the court quickly dispensed with the review of the remaining jury findings.\textsuperscript{208} The court found ample evidence for the jury to have concluded that Cook was otherwise qualified to act as a nurse, as she had done so over the past five years and had passed the screening physical.\textsuperscript{209} Similarly, the court found, as the Rehabilitation Act requires, that Cook was refused work solely because

\textsuperscript{200} \textit{Id.} at 24.
\textsuperscript{201} \textit{Id.}.
\textsuperscript{202} \textit{Id.} at 24, n.8.
\textsuperscript{203} \textit{Id.} at 24.
\textsuperscript{204} \textit{Id.}.
\textsuperscript{206} \textit{Cook}, 10 F.3d at 24.
\textsuperscript{207} \textit{Id.}.
\textsuperscript{208} \textit{Id.} at 26–28.
\textsuperscript{209} \textit{Id.} at 20.
of her disability. Indeed, the defendant never suggested any other reason for their refusal to hire her.

3. **Cook’s Shortcomings, and the “Underlying Physiological Cause” Requirement**

Although *Cook* seemed to have opened the door for “regarded as” obesity ADA litigation, it is not without limitations. As subsequent cases have noted, *Cook* is merely confirming a jury’s findings under a highly deferential standard of review. *Cook* does not state that even morbid obesity is always, or even often, a disability under the ADA. Rather, *Cook* stands for the more limited idea that under some circumstances, a judge will not overrule a jury’s finding that an employer *regarded* a morbidly obese applicant as having a qualifying disability. In fact, recent trends seem to indicate that obesity will only be considered a disability when there is some underlying physiological abnormality that causes the obesity, a trend not contradicted by *Cook*, since there was evidence of an underlying physiological cause to Cook’s obesity. Indeed, despite Cook’s rejection of mutability and voluntariness, the concepts seem to linger in the requirement of an underlying physiological cause, which presumptively works to relieve the obese applicant of both blame and the ability to correct the condition.

Absent a finding of an underlying physiological cause, an obese litigant may not survive summary judgment. In *EEOC v. Watkins Motor Lines, Inc*, a 405-pound truck driver, who was fired because he was too overweight to safely do his job, lost his ADA claim on summary judgment, because “non-physiological morbid obesity is not an ‘impairment’ under the ADA.” Again, the facts in *Cook* do not conflict with this finding. The *Watkins* court continues by noting that employers are entitled to prefer some physical characteristics over others as long as those charac-

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210 Id. at 28.
211 Id.
213 See Francis v. City of Meridian, 129 F.3d 281, 286 (2d Cir. 1997).
214 See Nedder, 908 F. Supp. at 75, n.8.
216 *Cook*, 10 F.3d at 23.
217 *EEOC*, 463 F.3d at 441.
218 Id. at 438–39.
219 See *Cook*, 10 F.3d at 23.
teristics are not substantially-limiting disabilities.\textsuperscript{220} Similarly, the Second Circuit in \textit{Francis v. City of Meriden} held that "obesity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning of the [ADA] statutes."\textsuperscript{221} The physiological impairment requirement also significantly limits "regarded as" obesity litigation, since an employer must have regarded the plaintiff as suffering from a disability that is protected by the ADA.\textsuperscript{222} Thus, an employer must regard the employee as having physiologically-caused obesity that substantially limits a major life activity for an obesity "regarded as" claim to succeed—a highly specific, and, frankly, unlikely circumstance.\textsuperscript{223} Moreover, as obesity litigation becomes more common, savvy defendants will likely admit that they did not want to hire a fat person; not because they thought fat people could not do things other people could do, but simply because they do not like fat people. A defendant would have to bear the social stigma of such an admission, but the ADA does not prohibit such open discrimination.

Comparing the CTA with the ADA’s nondiscrimination language side by side reveals another disconnect between the realities of obesity and U.S. anti-discrimination law. Canada’s Transportation Agency is empowered to take corrective measures whenever a person with a disability encounters an undue transportation obstacle.\textsuperscript{224} Central to the 1P1F holding was the finding that the obstacle itself could be considered in determining whether a traveler had a disability and that there is no preset definition of "obstacle."\textsuperscript{225} In the ADA, the analogous language to "obstacle" is a "substantial effect" on a "major life activity." There has to be some trouble (obstacle) with a major life activity before one can be considered disabled.\textsuperscript{226} Unfortunately for obese passengers, there is a list of "major life activities," under the ADA, and "traveling" is, so far, not one of them.\textsuperscript{227} Thus, whatever special obstacles the obese may encounter when traveling have no bearing on whether they are considered disabled.

\begin{thebibliography}{9}
\item \textsuperscript{220} EEOC, 463 F.3d at 441.
\item \textsuperscript{221} Francis v. City of Meridian, 129 F.3d 281, 286 (2d Cir. 1997).
\item \textsuperscript{222} EEOC, 463 F.3d at 440.
\item \textsuperscript{223} See id.
\item \textsuperscript{224} Canada Transportation Act, R.S.C. Part V, §172(3) (1996).
\item \textsuperscript{225} McKay-Panos v. Air Canada, [2006] FCA 8, ¶ 37–40 (Can.).
\item \textsuperscript{227} Coons v. Sec’y of the U.S. Dep’t of Treasury, 383 F.3d 879, 885 (9th Cir. 2004); Reeves v. Johnson Controls World Servs, Inc., 140 F.3d 144, 153 (2d Cir. 2004).
\end{thebibliography}
under the ADA. This exclusion of travel-related obstacles seems reminiscent of the Canadian Agency’s formalistic 2002 McKay-Panos holding. While excluding “travel” from the list of major life activities does not place obese travelers in quite the same catch-22, it does demonstrate an unwillingness to consider special circumstances when judging the merits of ADA claims.

4. The ADA Amendments Act of 2008

Congress, evidently displeased with the strict interpretation the courts have given the ADA, passed the ADA Amendments Act of 2008 (the 2008 Amendments), broadening the scope of who qualifies as a person with a disability. Although the 2008 Amendments do broaden the ADA’s scope of coverage, it is unclear whether they will have any effect on ADA obesity litigation. The basic definition of disability as an impairment that “substantially limits one or more major life activities” remains unchanged, and the 2008 Amendments do not explicitly overrule the cases requiring an underlying physiological cause for obesity to be considered a disability.

The two most striking changes in the 2008 Amendments are that: (1) there is no longer a need to consider the effect of mitigating measures when determining the presence of a disability and (2) the language of what qualifies as a disability is to be broadly construed. The first point explicitly overrules *Sutton v. United Air Lines, Inc.*, eliminating the need to consider mitigating measures when determining the existence of a disability. Under *Sutton*, “corrected” disabilities were not protected by the ADA. For example, a largely deaf person, whose hearing was normal with a hearing aid may not have been considered disabled, leaving a loophole allowing discrimination against people with “corrected” disabilities. The 2008 Amendments provide a non-exhaustive list of corrective measures that are not to be considered, including medication, medical supplies, equipment, and prosthetic limbs. However, despite the pharmaceutical industry’s best efforts, there is currently no effective “correction”

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228 The ADA does not require the finding of an undue obstacle within the transportation system.
229 42 U.S.C §§ 12101–03.
231 See 42 U.S.C §§ 12101–03.
234 See id.
for obesity,\textsuperscript{235} and little danger of anyone discriminating against a previously-obese person who had taken corrective measures. Thus, overruling \textit{Sutton} does little to aid obese ADA litigants.

The 2008 amendments also explicitly overrule \textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams},\textsuperscript{236} which required a strict interpretation of the phrases "substantially limits" and "major life activities," creating "a demanding standard for qualifying as disabled."\textsuperscript{237} In stark contrast, the 2008 Amendments state that "the definition of disability . . . shall be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of this chapter."\textsuperscript{238} This language is likely the best hope for ADA obesity litigation. Under a fresh reading of the statute, it seems clear that extreme obesity may substantially limit a number of major life activities, such as walking or bending. Moreover, under such broad, inclusive language, it may be difficult to justify the retention of the judicially engrafted underlying physiological cause doctrine. On the other hand, nothing in the 2008 Amendments explicitly prohibits requiring some underlying physiological cause for a disability. It seems quite possible that the circuits may split on the issue, with conservative circuits like the Fourth retaining the common law underlying physiological cause doctrine, and more liberal circuits, like the Ninth, rejecting the pre-2008 Amendments common law and accepting general obesity as a potential disability under a plain reading of the statutory language.

It is unclear whether the ADA will now be an effective vehicle to combat obesity discrimination, but under the 2008 Amendments, it offers the most promise. The 2008 Amendments have raised serious questions about the underlying physiological cause doctrine, and have apparently reversed the historically restrictive judicial treatment of the ADA. However, as long as the underlying physiological cause doctrine remains in effect, the ADA is unlikely to effectively address obesity discrimination. Indeed, there is persuasive evidence that obesity is largely a social phenomenon related mostly to the obesity level of your peer

\textsuperscript{235} One may argue that proper nutrition and exercise may "correct" obesity, but that does not seem to be the type of corrective measure the 2008 Amendments speak to. See 42 U.S.C. § 12102.

\textsuperscript{236} 42 U.S.C. § 12101, historical and statutory notes, (a)(5).

\textsuperscript{237} Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002).

\textsuperscript{238} 42 U.S.C. § 12102(4)(A).
group, rather than genetics or environmental factors. In a study that spanned thirty-four years, researchers found that people were 57% more likely to become obese if a friend became obese, strongly suggesting a social component to the spread of obesity, and leading some in the media to suggest that obesity is “socially contagious.” However, given the broad language in the 2008 Amendments, it may be that U.S. law will mirror the Canadian rule, and that the cause of obesity will become irrelevant. Although the ADA is important in establishing the foundation for general obesity anti-discrimination law, the airlines are governed by the Air Carrier Access Act, which has its own procedural difficulties.

C. THE AIR CARRIER ACCESS ACT

The Air Carrier Access Act was passed in 1986 to address the difficulties experienced by disabled passengers during air travel. The nondiscrimination language of the ACAA closely tracks the ADA, prohibiting foreign and domestic air-carriers from discriminating against “otherwise qualified individuals” who have a physical or mental impairment that substantially limits one or more major life activities. Also like the ADA, the ACAA allows “regarded as” suits, prohibiting discrimination against anyone even believed by the carrier to have a disability. Under the ACAA, an “otherwise qualified individual” is essentially anyone who purchases a ticket, and presents himself for travel. There is at least one court that has used ADA case law to define “disability” in ACAA cases, although the ACAA differs in that its implementing regulations explicitly include temporary conditions as disabilities.

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240 Id.
244 Id.
1. Obesity as a Disability Under the ACAA

On the merits, there seems to be greater hope of obesity discrimination protections in the ACAA than in the ADA, particularly if the changes in the ADA Amendments Act of 2008 are incorporated into the judicial treatment of the ACAA. The inclusion of temporary disabilities in the ACAA cuts directly in favor of the possibility of the inclusion of obesity as a disability. The unspoken role that mutability plays in the "underlying physiological cause" requirement in ADA litigation may thus be attenuated in ACAA actions. Moreover, since the entire purpose of the ACAA is to allow the disabled access to the airlines, courts may be inclined to depart from the ADA's exclusion of "traveling" as a major life activity. However, even if the ACAA does accept traveling as a major life activity, there seems to be plenty of room in the ACAA for judges to adopt an "underlying physiological cause" requirement functionally identical to the ADA, despite the ACAA's inclusion of temporarily disabling conditions, as there are certainly "temporary" physiological conditions. Moreover, the ADA Amendments Act of 2008 does not technically apply to the ACAA. However, perhaps the largest obstacle to obesity discrimination actions against the airlines under the ACAA is the ACAA's lack of a private cause of action.

2. No Private Cause of Action Under the ACAA

The most recent cases involving ACAA litigation have found that there is no private cause of action in the ACAA.\textsuperscript{247} Although the ACAA statutory language does not explicitly create any private cause of action,\textsuperscript{248} earlier courts were willing to engraft not only an implied private cause of action onto the ACAA, but compensatory and emotional distress damages as well.\textsuperscript{249} Tallarico v. Trans World Airlines, Inc., an Eighth Circuit case from 1989, and Shinault v. American Airlines, Inc., a 1991 Fifth Circuit case, both used a four-factor test to find an implied private cause of action.\textsuperscript{250} The test, first promulgated by the U.S.

\begin{footnotesize}
\begin{enumerate}
\item Lynch, supra note 179, at 237-39.
\item Shinault v. American Airlines, Inc., 936 F.2d 796, 800 (5th Cir. 1991); Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 568 (8th Cir. 1989).
\end{enumerate}
\end{footnotesize}
Supreme Court in Cort v. Ash, lists the following factors to consider: (1) whether the plaintiff is a member of the class of persons the statute was intended to benefit; (2) whether there is any indication of the legislature’s intent to create or deny an implied private cause of action; (3) whether a private cause of action is consistent with the underlying purpose of the statute; and (4) whether creating an implied private cause of action in a federal court would infringe on an area traditionally regulated by state law.\textsuperscript{251} Both Tallarico and Shinault found that all four factors were satisfied, and thus found that a private cause of action did exist under the ACA\textsuperscript{A}.\textsuperscript{252}

In finding that Congress implicitly intended a private cause of action, the Tallarico court found that the legal context surrounding the ACA\textsuperscript{A} supported the finding of a private cause of action. The ACA\textsuperscript{A} was patterned after the Rehabilitation Act, and was actually enacted in response to a U.S. Supreme Court holding that the Rehabilitation Act applied only to air carriers that directly received federal funding.\textsuperscript{253} The court reasoned that since the Rehabilitation Act had been found to contain an implied private cause of action, Congress implicitly intended the ACA\textsuperscript{A} to have an implied private cause of action as well.\textsuperscript{254}

However, the 2001 case, Alexander v. Sandoval, narrowed the rules for finding an implied cause of action, focusing only on congressional intent.\textsuperscript{255} The Court found that without congressional intent to create a private cause of action, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”\textsuperscript{256} The Sandoval Court went further to declare that even the legal context in which the statute was passed was unimportant, and that the investigation into the existence of a private cause of action begins and ends within the text and structure of the statute itself.\textsuperscript{257} Sandoval did not explicitly overrule Cort v. Ash, but did significantly narrow the types of information that could be considered in determining congressional intent.\textsuperscript{258}

\textsuperscript{251} Cort v. Ash, 422 U.S. 66, 78 (1975).
\textsuperscript{252} Shinault, 936 F.2d at 800; Tallarico, 881 F.2d at 570.
\textsuperscript{253} Tallarico, 881 F.2d at 570.
\textsuperscript{254} Id.
\textsuperscript{255} Sandoval, 532 U.S. at 286–87.
\textsuperscript{256} Id.
\textsuperscript{257} Id. at 288.
\textsuperscript{258} Id.
Although neither Tallarico nor Shinault have been explicitly overruled, the Third, Tenth and Eleventh circuits have all found that applying the Sandoval text and structure test leads to a rejection of an ACAA private cause of action.\(^{259}\) Love v. Delta Airlines was the first post-Sandoval case to investigate a private ACAA cause of action and subsequent holdings have followed its form and result. Love recognized that both Tallarico and Shinault found that a private cause of action did exist in the ACAA, but insisted that under Sandoval, the broad-ranging underlying purpose type of analysis conducted in both of those cases is no longer appropriate.\(^{260}\) In conducting its analysis into the text and structure of the ACAA, Love notes that the ACAA provides an extensive framework for enforcement of the ACAA provisions, but that the right for a private person to sue in federal district court is “notably absent.”\(^{261}\) Instead, the ACAA requires individuals to file a complaint with the Department of Transportation (DOT), which is required to investigate each complaint.\(^{262}\) Moreover, the ACAA explicitly includes a private right for litigants to have administrative decisions reviewed in federal appeals courts.\(^{263}\) Congress’s explicit inclusion of a private right of action for administrative review strongly persuaded the Love court that Congress had not intended to include other private rights of action.\(^{264}\)

The lack of a private cause of action in the ACAA greatly devalues the ACAA as a source of obesity discrimination protections. As discussed below, the Federal Aviation Administration (FAA) is unlikely to unilaterally declare obesity a disability, and while individuals may appeal FAA decisions, the standard of review for administrative decisions is highly deferential.\(^{265}\) Under the Administrative Procedures Act, to set aside an agency action, a court must find that the action was arbitrary and capricious, or in some other way contrary to the law.\(^{266}\) As described extensively above, there are a number of rational arguments the FAA


\(^{260}\) Love, 310 F.3d at 1358–59.

\(^{261}\) Id. at 1354.


\(^{263}\) Love, 310 F.3d at 1356.

\(^{264}\) Id. at 1357.


\(^{266}\) Id.
could use to support a finding that obesity is not a disability under the ACAA, thus any hope for obesity protection under the ACAA must rest in the unlikely event of the FAA itself holding that obesity is a disability.

The FAA is highly unlikely to declare obesity a disability under the ACAA. The 1P1F policy came from what is essentially the Canadian version of the DOT (which includes the FAA), but obesity discrimination does not appear to be on the FAA’s radar. The Obama administration has far more fundamental aspirations for the FAA, such as finding a chief administrator, solving the seemingly endless air-traffic controller labor disputes, and obtaining permanent funding for the Agency.\textsuperscript{267} Additionally, the Obama administration’s lofty goals for military, economic, and social change will require an enormous amount of political capital—capital he is unlikely to spend on a divisive and comparatively minor issue such as obesity disability. As far as the possibility for some type of 1P1F ruling from the FAA, the implementing regulations may provide some insight. The regulations flatly state that as far as seating accommodations are concerned carriers “are not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased.”\textsuperscript{268} Of course, this is a regulation, and not law, but under an arbitrary and capricious standard of review, it is unlikely to be successfully challenged.

\textbf{IV. CONCLUSION}

Under the present legal and social framework, the United States is highly unlikely to adopt anything resembling Canada’s 1P1F rule. Indeed, U.S. law has a long way to go to even provide basic discrimination protections for obese citizens. Title VII provides no statutory protection for obese employees subject to direct discrimination,\textsuperscript{269} and has only the possibility of indirect protection for disparate impact discrimination through the association between obesity, race, and gender.\textsuperscript{270} Likewise, the ADA presently provides reasonably reliable protection only to individuals whose obesity has been caused by a verifiable, underlying


\textsuperscript{268} 14 CFR §382.38 (2008).


physiological condition. The 2008 Amendments may offer some relief for general obesity discrimination, but are currently untested. Finally, the ACAA, perhaps the best hope for obese passengers, is hamstrung by its lack of a private cause of action. Only the FAA can enforce the ACAA provisions, and given the current social and political landscape it seems unlikely that the new administration and the beleaguered FAA will pursue the divisive issue of obesity-disability in the near future.

Of course, Congress could remedy the lack of statutory obesity discrimination protection, but before we decide how we might end obesity discrimination, we must decide as a society whether we should end obesity discrimination. As politically incorrect as the question may be, the issue remains: is being overweight the type of characteristic we, as a society, wish to protect? Do we elevate body-weight to the level of race and gender by including it in the hallowed words of The Civil Rights Act of 1964? Do we give overweight Americans the same accommodations we give to those with muscular dystrophy or cancer by defining obesity as a disability under the ADA or ACAA? There would certainly be benefits of such a change. Bigotry is undesirable in any form, and including body-weight in the list of protected characteristics would help prevent much of the hardships faced by millions of obese Americans. But America is full of unprotected bigotry—against the ugly, against people with thick regional accents, against short men, and so on. These characteristics are difficult, if not impossible to alter, and are certainly involuntary, but none are legislatively protected. Should we none the less protect obesity as we would race, or gender?

Given the current scientific understanding of obesity's social etiology, the answer must be "no." For the most part, obesity appears to be a symptom, not a disease. Undoubtedly, there are diseases that cause obesity; for example, polycystic ovary syn-

271 See Francis v. City of Meridian, 129 F.3d 281, 286 (2d Cir. 1997).
275 See Christakis & Fowler, supra note 239.
drome is related to obesity in many patients. However, if America’s fascination with *The Biggest Loser* has shown us anything, it is that even the most morbidly obese can lose astonishing amounts of weight through diet and exercise. It may not be easy to make such a radical change, but radically changing one’s lifestyle is rarely easy. If obesity is generally a lifestyle choice, and not typically the result of an underlying physiological condition, why protect against obesity and not other socially stigmatized affectations, like dirty clothes, bad breath, or body odor? If our scientific understanding of obesity changes, and obesity is found to be truly uncontrollable in most cases, we may rethink our laws and choose to give body weight the same protections we afford to other ascribed characteristics. However, as long as our true understanding of obesity is that, in the majority of cases, it is a mutable and voluntary condition, we should not support it with such lofty protections.
